# CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of***

***Decisions, Rulings, Regulations, Notices, and Abstracts***

***Concerning Customs and Related Matters of the***

***U.S. Customs Service***

***U.S. Court of Appeals for the Federal Circuit***

***and***

***U.S. Court of International Trade***

**VOL. 35 FEBRUARY 7, 2001 NO. 5 & 6**

*This issue contains:*



DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

19 CFR Part 12

(T.D. 01–06)

RIN 1515–AC66

IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL MATERIAL ORIGINATING IN ITALY AND REPRESENTING THE PRE-CLASSICAL, CLASSICAL, AND IMPERIAL ROMAN PERIODS

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of import restrictions on certain archaeological material originating in Italy and representing the pre-Classical, Classical, and Imperial Roman periods of its cultural heritage, ranging in date from approximately the 9th century B.C. through approximately the 4th century A.D. These restrictions are being imposed pursuant to an agreement between the United States and Italy that has been entered into under the authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The document amends the Customs Regulations by adding Italy to the list of countries for which an agreement has been entered into for imposing import restrictions. The document also contains the Designated List of Archaeological Material that describes the types of articles to which the restrictions apply.

EFFECTIVE DATE: January 23, 2001.

FOR FURTHER INFORMATION CONTACT: (Legal Aspects) Joseph Howard, Intellectual Property Rights Branch (202) 927-2336; (Operational Aspects) Al Morawski, Trade Operations (202) 927-0402.

## SUPPLEMENTARY INFORMATION:

### BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.*) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance to the nations from where they originate and to achieving greater international understanding of mankind's common heritage.

During the past several years, import restrictions have been imposed on archaeological and ethnological artifacts of a number of signatory nations. These restrictions have been imposed as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries. More information on import restrictions can be found on the International Cultural Property Protection web site (http://exchanges.state.gov/education/culprop).

Import restrictions are now being imposed on certain archaeological material of Italy representing the pre-Classical, Classical, and Imperial Roman periods of its cultural heritage as the result of a bilateral agreement entered into between the United States and Italy. This agreement was entered into on January 19, 2001, pursuant to the provisions of 19 U.S.C. 2602. Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and Italy. This document amends the regulations by imposing import restrictions on certain archaeological material from Italy as described below.

MATERIAL ENCOMPASSED IN IMPORT RESTRICTIONS

In reaching the decision to recommend protection for Italy's cultural patrimony, the Assistant Secretary of State for Educational and Cultural Affairs, U.S. Department of State, determined that, pursuant to the requirements of the Act, the cultural patrimony of Italy is in jeopardy from the pillage of archaeological materials which represent its pre-Classical, Classical and Imperial Roman heritage, and that such pillage is widespread, definitive, systematic, on-going, and frequently associated with criminal activity. Dating from approximately the 9th century B.C. to approximately the 4th century A.D., categories of restricted artifacts include stone sculpture, metal sculpture, metal vessels, metal ornaments, weapons/armor, inscribed/decorated sheet metal, ceramic sculpture and vessels, glass architectural elements and sculpture, and wall paintings. These materials are of cultural significance because they derive from cultures that developed autonomously in the region of present day Italy that attained a high degree of political, technological, economic, and artistic achievement. The pillage of these materials from their context has prevented the fullest possible understanding of Italian cultural history by systematically destroying the archaeological record. Furthermore, the cultural patrimony represented by these materials is a source of identity and esteem for the modern Italian nation.

DESIGNATED LIST

The bilateral agreement between Italy and the United States covers the categories of artifacts described in a Designated List of Archaeological Material from Italy, which is set forth below. Importation of articles on this list is restricted unless the articles are accompanied by an appropriate export certificate issued by the Government of the Republic of Italy or documentation demonstrating that the articles left the country of origin prior to the effective date of the import restriction.

ARCHAEOLOGICAL MATERIAL FROM ITALY REPRESENTING PRE-CLASSICAL, CLASSICAL, AND IMPERIAL ROMAN PERIODS RANGING IN DATE APPROXIMATELY FROM THE 9TH CENTURY B.C. TO THE 4TH CENTURY A.D.

I. *Stone*

A. *Sculpture*

1. *Architectural Elements* – In marble, limestone, steatite, basalt, tufa and other types of stone. Types include abacus, acroterion, antefix, architrave, bacino, base, capital, caryatid, coffer, clipeus, column, crowning, fountain, frieze, pediment, drip molding, pilaster, mask, corbel, metope, mosaic and inlay, pluteus, pulvinar, puteal, jamb, tile, telamon, tympanum, trabeation, transenna, basin, wellhead. Approximate date: 7th century B.C. to 4th century A.D.

2. *Architectural and Non-architectural Relief Sculpture* – In marble and other stone. Types include carved slabs with figural, vegetative,

floral, or decorative motifs, sometimes inscribed, and carved relief vases. Used for architectural decoration, funerary, votive, or commemorative monuments. Approximate date: 2nd century B.C. to 4th century A.D.

3. *Monuments* – In marble, limestone, and other types of stone. Types include altar and shrine, cippus, funerary stele, and milestones with figural reliefs or decorative moldings. Some have dedicatory inscriptions. Approximate date: 7th century B.C. to 4th century A.D.

4. *Sepulchers* – In marble, peperino, alabaster, limestone, and tufa. Types of burial containers including urns, caskets, and sarcophagi. Some have figural scenes carved in relief or decorative moldings. Approximate date: 7th century B.C. to 4th century A.D.

5. *Large Statuary* – Primarily in marble, including fragments of statues. Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual). Approximate date: 6th century B.C. to 4th century A.D.

II. *Metal*

A. *Sculpture*

1. *Large Statuary* – Large-scale statues or fragments of statues in bronze or other metals, including animal figures, human and divine figures, and life-size metal busts or portrait heads. Approximate date: 6th century B.C. to 4th century A.D.

2. *Small Statuary* – Iron Age Sardinian (Nuragic) and Etruscan figurines in bronze and other metals. Approximate date: 8th to 3rd century B.C.

B. *Vessels* – Open and closed vessels in bronze, gold, or silver, often with incised, embossed, and molded decoration in the shape of human or animal figures. Shapes include bowls, buckets, craters, pitchers, cups, and lamps, etc. Approximate date: 8th century B.C. to 4th century A.D.

C. *Personal Ornaments* – Etruscan and Italic rings, necklaces, earrings, crowns, bracelets, buckles, belts, pins, chains of gold, silver, bronze, and iron Approximate date: 8th to 3rd century B.C.

D. *Weapons and Armor* – Body armor, including helmets, cuirasses, shin guards, and shields, and horse armor often decorated with elaborate engraved, embossed, or perforated designs. Elaborate horse armor is also produced during the same period. Both launching weapons (spears and javelins) and weapons for hand to hand combat (swords, daggers, etc.). Approximate date: 8th century B.C. to 4th century A.D.

E. *Inscribed or Decorated Sheet Metal* – Engraved inscriptions often found in funerary contexts and thin metal sheets with engraved or impressed designs often used as attachments to furniture. Approximate date: 7th century B.C. to 4th century A.D.

III. *Ceramic*

A. *Sculpture*

1. *Architectural Elements* – Baked clay (terracotta) elements used to decorate buildings. These are most often found in Etruria, Latium, Sicily, and Magna Graecia. Elements include acroteria, antefixes, relief plaques, metopes, and revetments. Approximate date: 7th century to 1st century B.C.

2. *Monuments* – Altars and urns decorated with relief scenes. Approximate date: 5th century B.C. to 4th century A.D.

3. *Large Statuary* – Large-scale human and animal figures, life-size portrait heads, and life-size votive objects, including fragments of statues. These are often found in temples and sanctuaries in Magna Graecia, Etruria, and Latium. Approximate date: 7th century to 1st century B.C.

4. *Objects with Relief Decoration* – Plaques, tables, and other terracotta objects (masks) with relief decoration. Approximate date: 6th to 4th century B.C.

B. *Vessels*

1. *Local Vessels*

a. *Etruscan* – Decorated ceramic vessels produced by Etruscan culture, including Villanovan; Orientalizing pottery with imitations of Near Eastern designs painted on local hand-made vessels; archaic Etruscan painted pottery with polychrome decoration; archaic Etruscan painted pottery with polychrome decoration; funerary and cinerary vessels; Italo-Geometric pottery where production from local Etruscan workshops imitated Greek Geometric; bucchero made with a characteristic soft black paste and polished surface whose highly decorative shapes often imitate metal vessels; local imitations of black and red figure Attic; Etruscan imitations of Corinthian pottery; pottery with black glaze and orange stripes that imitates Ionic pottery; amphora in the Pontic style with painted figural decoration made by a single workshop of immigrant Ionic potters in Vulci, Etruria; Caeretan hydria attributed to a workshop of Greek immigrants working near Caere, Etruria. Approximate date: 9th century to 3rd century B.C.

b. *South Italian and Italic* – Decorated vessels locally produced, including hand-made Daunian pottery from northern Apulia; Italiote red figure pottery of Attic derivation produced in Apulian, Lucania, Campania, and Paestum; wheel-made pottery with elaborate applied relief and painted decoration made in Centuripe, Catania; pottery with plastic and polychrome decoration produced in Sicily and Magna Graecia; gilded pottery with a characteristic ochre yellow color imitating artifacts in bronze, mainly found in tombs in Apulia; Faliscan pottery in imitation of Attic red figure, often in oversize vessels; Gnathian pottery, named after Egnatia in Apulia and decorated in white and yellow with touches of red over a black background; overpainted pottery with a shiny black glaze; pottery overpainted with

white, yellow, or red designs in imitation of Attic red figure; Messapian pottery, locally produced in Apulia and decorated with monochrome (one color) or bichrome painting (two color). Approximate date: 8th to 3rd century B.C.

2. *Imported Vessels*

a. *Attic Black Figure, Red Figure and White Ground Pottery* – These are made in a specific set of shapes (amphorae, craters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground). Attic pottery was widely exported, particularly to southern Italy, where it is commonly found in burials. Approximate date: 6th to 4th century B.C.

b. *Corinthian Pottery* – Painted pottery made in Corinth in a specific range of shapes for perfume and unguents and for drinking or pouring liquids. The very characteristic painted and incised designs depict figural scenes, rows of animals, and floral decoration. Corinthian pottery was exported throughout the Mediterranean, but particularly to Etruria and southern Italy. Approximate date: 8th to 6th century B.C.

IV. *Glass*

A. *Architectural Elements* – Mosaics and glass windows. Approximate date: 4th century B.C. to 4th century A.D.

B. *Sculpture*

1. *Intarsia* – Cut or carved glass decorative elements to inset in furniture. Approximate date: 2nd century B.C. to 4th century A.D.

2. *Small Statuary* – Glass animal statuettes as amulets or knick-knacks. Approximate date: 2nd century B.C. to 4th century A.D.

V. *Painting*

A. *Wall Painting*

1. *Domestic and Public Wall Painting* – Beginning in about 200 B.C. wall painting in private and public buildings is characterized by imitation of stucco or marble design. Later developments include "architectural" style, "ornamental" style, and "fantastic" style. Triumphal painting in temples and public buildings illustrate military campaigns and conquered lands. Approximate date: 3rd century B.C. to 4th century A.D.

2. *Tomb Paintings* – Early tomb paintings are primarily found in Etruria and Southern Italy. These paintings were directly influenced by Greek painters, but illustrate local style. Scenes often illustrate funerary celebrations, rites, symbols, and daily events. Roman funerary painting is also inspired by Greek painting, but also develops from domestic and public types of wall painting. Approximate

date: 6th century B.C. to 4th century A.D.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the amendment to the Customs Regulations contained in this document imposing import restrictions on the above-listed cultural property of Italy is being made in response to a bilateral agreement entered into in furtherance of the foreign affairs interests of the United States, pursuant to section 553(a)(1) of the Administrative Procedure Act, (5 U.S.C. 553(a)(1)), no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is not required pursuant to 5 U.S.C. 553(d)(3).

REGULATORY FLEXIBILITY ACT

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, this final rule is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This amendment does not meet the criteria of a "significant regulatory action" as described in E.O. 12866.

DRAFTING INFORMATION

The principal author of this document was Bill Conrad, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property.

AMENDMENT TO THE REGULATIONS

Accordingly, Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general authority and specific authority citations for Part 12, in part, continue to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

* * * * *

2. In § 12.104g, paragraph (a), the list of agreements imposing import restrictions on described articles of cultural property of State

Parties, is amended by adding Italy in appropriate alphabetical order as follows:

| State | Cultural Property | T.D. No. |
|---|---|---|
| * * * * * | * * * * * | * * * * * |
| Italy..... | Archaeological Material of pre-Classical, Classical, and Imperial Roman periods ranging approximately from the 9th century B.C. to the 4th century A.D. | T.D. 01–06 |
| * * * * * | * * * * * | * * * * * |

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RAYMOND W. KELLY,
*Commissioner of Customs.*

TIMOTHY E. SKUD,
*Acting Deputy Assistant Secretary of the Treasury.*

[Published in the **Federal Register**, January 23, 2001 (66 FR 7399)]

# U.S. Customs Service

## *General Notice*

FEE FOR ELECTRONIC FINGERPRINTING

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This document announces an increase in the fee for fingerprinting at airports at which there is a computerized fingerprint identification system for the use of conducting background checks on airline and airport employees who require unescorted access to Federal Inspection Service areas of an airport. The fee will be raised to $43.50.

EFFECTIVE DATE: January 29, 2001.

FOR FURTHER INFORMATION CONTACT: Linda Slattery, U.S. Customs Service, Office of Field Operations, Passenger Programs, Room 5.4D, 1300 Pennsylvania Avenue, NW, Washington, DC, 20029, Tel. (202) 927-4434.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On July 11, 2000, Customs published a document in the **Federal Register** (65 FR 42766) regarding the implementation, at certain airports, of a computerized fingerprint identification system (Integrated Automated Fingerprint Inspection System (IAFIS)) for the use of conducting background checks on airline and airport employees who require unescorted access to Federal Inspection Service areas of an airport. The IAFIS employs an automated fingerprint reading device that electronically transmits the fingerprint data directly to the Federal Bureau of Investigation (FBI) where a criminal history background search can be conducted within 24 hours, instead of the four to seven weeks it normally takes to manually process fingerprint cards. Where implemented, this computerized fingerprinting system will be used in lieu of collecting fingerprints on cards.

Customs announced in the July 11 **Federal Register** notice that the fee for this computerized fingerprinting would be $39.00. The fee is based on Customs recovering the FBI user-fee that is charged to Customs for conducting fingerprint checks and Customs administra-

tive processing costs associated with the collection of fingerprints, which include the compensation and/or expenses of Customs officers performing the fingerprint service and 15% of that amount to cover Customs administrative overhead costs.

Primarily because the fee charged Customs by the FBI has been increased, Customs is announcing that it must increase the fee for fingerprinting at airports utilizing the IAFIS. The fee will be raised to $43.50 to offset the fee being charged Customs by the Federal Bureau of Investigation.

Dated: January 22, 2001.

CHARLES W. WINWOOD,
*Acting Commissioner.*

[Published in the **Federal Register**, January 29, 2001 (66 FR 8147)]

# U.S. Customs Service

January 24, 2001

Department of the Treasury
Office of the Commissioner of Customs
Washington, D.C.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
*Assistant Commissioner,*
*Office of Regulations and Rulings.*

# U.S. Customs Service

## *General Notices*

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT REGARDING NAFTA ELIGIBILITY OF "BACKFLEX COVER & BELT CLIP"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the modification of ruling letter and revocation of treatment relating to the "Backflex Cover & Belt Clip" as it relates to the status of this product under the North American Free Trade Agreement (NAFTA).

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter relating to the eligibility of the "Backflex Cover & Belt Clip" under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment previously accorded by the Customs Service to substantially identical merchandise. Notice of the proposed modification was published in the CUSTOMS BULLETIN of November 22, 2000, Vol. 34, No. 47. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 9, 2001.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, at (202) 927-2380.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts, which emerge from the law, are **"informed compliance"** and **"shared responsibility."** These con-

cepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In New York Ruling (NY) E88017, Customs ruled that the merchandise did not qualify for preferential treatment under the NAFTA because the materials used in the production of the goods would not undergo the change in tariff classification required by General Note 12(t)/63, HTSUSA. This ruling letter is set forth as "Attachment A" to this document. Since the issuance of this ruling, Customs has reviewed the NAFTA eligibility of this merchandise and has determined that the cited ruling is in error. We have determined that this item was properly classified under subheading 6307.90.9989, HTSUS. However, the merchandise does qualify for preferential treatment under the NAFTA because General Note 12(t), Chapter Rule 1 to Chapter 63, states that "For the purposes of determining origin of a good of this chapter, the rule applicable to that good shall only apply to the component that determines tariff classification of the good...". In the case of the subject merchandise, "Backflex Cover & Belt Clip", it is the fabric which forms the textile pouch which determined that the product should be classified under a textile provision, subheading 6307.90.9989, HTSUS. Inasmuch as the fabric is wholly formed in the United States, it is our decision that the subject good is a NAFTA originating good under General Note 12(b), HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY E88017, dated October 15, 1999, and any other ruling not specifically identified, to reflect the proper NAFTA status of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter HQ 964313 (*see* "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this modification will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.* ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)),

Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: January 19, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

*January 19, 2001*
CLA-2 RR:CR:TE 964313 ASM
Category: Classification
Tariff No. 6307.90.9989

S. GARY KILLEEN
*#207-5558-208th St.*
*Langley, B.C. V3A 2K3*
*Canada*

Re: Modification of NY E88017: NAFTA eligibility of "Backflex Cover & Belt Clip.

DEAR MR. KILLEEN:

This is in regard to New York Ruling (NY) E88017 issued to you on October 15, 1999, which involved the classification of the "Backflex Cover & Belt Clip" under the Harmonized Tariff Schedule of the United States Annotated and the status of this product under the North American Free Trade Agreement (NAFTA). A sample was submitted to this office for examination. We have reviewed this ruling and determined that the decision regarding NAFTA eligibility is incorrect. This ruling modifies NY E88017 by providing a correct determination with respect to the good's NAFTA status.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of was published on November 22, 2000, in the CUSTOMS BULLETIN, Volume 34 , Number 47. No comments were received.

*Facts:*

The subject item is identified as the "Backflex Cover & Belt Clip" and is used for holding flexible magnets against the body for the purpose of relieving pain. The cover is essentially a pocket constructed by sewing together two panels of laminated fabric. The laminated fabric features three-layer construction with nylon knit pile fabric on the outer surface, a core of polyester cellular plastic in the center and a backing fabric of nylon warp knit fabric. This product, which measures approximately 8 inches by 6.5 inches, tapers slightly from bottom to top and has had its edges finished by overlock stitching. A metal clip is attached to the cover by a textile fabric hook fastener (a "Velcro"™ fastener) which engages with the loops of the outer knit pile fabric. The "Velcro"™ fastener is riveted to the metal clip and is supported by a strip of plastic in the form of a rectangular shape. The metal clip is used to fasten the cover to a belt and hold the cover close to the wearer's body to maximize the effect of the magnetic field.

Based on the certificates of origin that you submitted with this request, it appears that the laminated fabric forming the cover and stainless steel belt clip are both wholly manufactured in the United States with a preference criteria of "A". It is not clear from the documentation what foreign components are used in the manufacture of a strip of woven pile fabric glued to a plastic rectangular piece. You indicate that the "Velcro"™ hook fastener attached to the plastic support piece is manufactured in Canada, however, the certificate of origin indicates that this item incorporates foreign components and has been designated a preference criterion of "B". The metal rivets attaching the "Velcro"™ and plastic support to the metal clip are described as "brass eyelets" and certified by the owner of the company to be in compliance with the origin requirements of NAFTA. Finally, you state that the raw yarn for the thread used to sew the panels of fabric together is manufactured in China but is converted, colored and woven in Montreal, Canada, and constitutes less than ¼ of 1 percent of the subject product.

In NY E88017 dated, October 15, 1999, the subject item was classified in subheading 6307.90.9989, HTSUSA, which is dutiable under the general column one rate of 7 percent *ad valorem*. In addition, the ruling determined that the merchandise did not qualify for preferential treatment under the NAFTA because the materials used in the production of the goods will not undergo the change in tariff classification required by General Note 12(t)63, HTSUSA. You disagree with the determination that the article is not eligible for reduced duties under the NAFTA. You claim that the only foreign component used in the manufacture of this item is the sewing thread used to sew the cover together and that this thread should be ignored for the purposes of determining NAFTA eligibility since the thread represents less than 7 percent of the weight of the good and therefore is *de minimis* by application of Section 102.13 of the Customs Regulations.

*Issue:*

1. What is the proper tariff classification and duty rate for the subject merchandise?
2. Is the subject merchandise eligible for duty free treatment under the NAFTA?

*Law and Analysis:*

TARIFF CLASSIFICATION

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN, although not dispositive, are used to determine the proper interpre-

tation of the HTSUSA by providing a commentary on the scope of each heading of the HTSUSA. *See*, T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The determination of NAFTA eligibility is dependent, in part, on the tariff classification of the item. As such, we must first classify the item under the HTSUSA. The "Backflex Cover & Belt clip" is comprised of two detachable pieces which are constructed of different materials, *i.e.*, textile and metal. The textile pouch, taken separately, would be classifiable in subheading 6307.90.9989, HTSUSA, which is the textile provision for "Other made up articles" and the metal clip would be classifiable in subheading 8308.90.9000, HTSUSA, which provides for articles of base metals such as "Clasps, ... hooks." GRI 2(b) governs the classification of goods when there are mixtures and combinations of materials or substances, and when goods consist of two or more materials or substances. In relevant part, GRI 2(b) states that "The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 states:

> (a). The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b). Mixtures, composite goods consisting of different materials or made up of different components and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

In this case, the applicable headings, 6307 and 8308, each refer to only part of the materials which make up this product. Thus, pursuant to GRI 3(a), we must consider the headings equally specific in relation to the goods. Accordingly, the goods are classifiable pursuant to GRI 3(b) as if they consisted of the material or component that gives them their essential character. The EN to GRI 3(b) states:

> (VII). In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
>
> (VIII). The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Explanatory Note (IX), for the General Rule of Interpretation 3(b) provides, in relevant part, that a composite of two separable articles must together form a whole which would not normally be sold in separate parts. In this instance, the textile pouch can be characterized as having a "separable component", *i.e.*, the metal clip used to attach the entire unit to a belt or waistband. Clearly, these components function as a whole in that they are designed to be used together to hold a magnet close to the body of the user. These components would not fulfill their intended function if sold separately.

Recently , there have been several Court decisions on "essential character" for purposes of GRI 3(b). These cases have looked to the role of the constituent materials or components in relation to the use of the goods to determine essential character. *See, Better Home Plastics Corp. v. United States*, 916 F. Supp. 1265 (CIT 1996), affirmed 119 F. 3d 969 (Fed. Cir. 1997); *Mita Copystar America, Inc. v. United States*, 966 F. Supp. 1245 (CIT 1997), motion for rehearing and reconsideration denied, 994 F. Supp. 393 (CIT 1998), and *Vista International Packaging co.*,

*v. United States*, 19 CIT 868, 890 F. Supp. 1095 (1995). *See also, Pillowtex Corp. v. United States*, F. Supp. 188 (CIT 1997), affirmed CAFC No. 98-1227 (March 16, 1999).

The essential character of this composite good can be determined by comparing each component as it relates to the use of the product. The "Backflex Cover & Belt Clip" is used for holding in place flexible magnet pads. Although the metal clip provides the added feature of allowing the user to secure the product to a belt or waistband, it is the textile pouch, which actually contains the therapeutic magnet. In that sense, the textile pouch provides the essential character because it more directly serves the main goal of the product, *i.e.*, to carry the magnet which provides pain relief to the user. In Headquarter's Ruling (HQ) 957182, dated March 6, 1995, Customs classified a "body pad/back warmer" which was imported without its heating pack, as an "Other made up article" under subheading 6307.90.9989, HTSUSA. This article consisted of a textile pouch with a belt mechanism to secure it to the body. Like the textile pouch in the subject case, the "body pad/back warmer" textile pouch was specifically designed to hold a separate energy element designed to provide relief to the user; it also features a distinct attachment feature (belt mechanism) which is similar to the detachable metal clip of the "Backflex Cover & Belt Clip." In view of these similarities, this ruling serves as precedent in finding that the subject textile pouch is properly classified as "Other made up articles" in heading 6307, HTSUSA.

Based on the foregoing, it is our determination that the "Backflex Cover & Belt Clip" is classified pursuant to GRI 3(b), as "composite goods", under subheading 6307.90.9989, HTSUSA, which is the provision for "Other made up articles including dress patterns: Other: Other: Other, Other: Other." This provision is dutiable under the general column one rate at 7 percent *ad valorem*.

NAFTA ELIGIBILITY

The subject article, "Backflex Cover & Belt Clip", undergoes processing operations in Canada and incorporates materials produced in the United States. Both the United States and Canada are countries provided for under the North American Free Trade Agreement (NAFTA). General Note 12, HTSUSA, incorporates Article 401 of the NAFTA into the HTSUSA. Note 12(a) provides, in pertinent part:

* * *

(ii) Goods that **originate** in the territory of a NAFTA party under subdivision (b) of this note **and that qualify to be marked as goods of Canada** under the terms of the marking rules... and are entered under a subheading for which a rate of duty appears in the "Special" subcolumn followed by the symbol "CA" in parentheses, are eligible for such duty rate... . [Emphasis supplied]

In order to be eligible for the "Special" "CA" rate of duty, the merchandise must be NAFTA originating goods under General Note 12(b), HTSUSA, and qualify to be marked as goods of Canada. Note 12(b) provides in pertinent part,

> For the purposes of this note, goods imported into the customs territory of the United States are eligible for the tariff treatment and quantitative limitations set forth in the tariff schedule as "**goods originating in the territory of a NAFTA party**" only if—
>
> (i) they are goods wholly obtained or produced entirely in the territory of Canada, Mexico and/or the United States; or
>
> (ii) they have been transformed in the territory of Canada, Mexico and/or the United States so that—
>
> (A) except as provided in subdivision (f) of this note, each of the non-originating materials used in the production of such goods under-

goes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein, or,

(B) the goods otherwise satisfy the applicable requirements of subdivisions (r), (s) and (t) where no change in tariff classification is required, and the goods satisfy all other requirements of this note; or

(iii) they are goods produced entirely in the territory of Canada, Mexico and/or the United States exclusively from originating materials; or...

* * *

In applying the NAFTA Rules of Origin, it is important to note that the aforementioned rules are not sequential. General Note 12(b)(ii)(A) is used when there are some foreign materials involved in the product. Thus, the subject merchandise qualifies for NAFTA treatment only if the provisions of General Note 12 (b)(ii)(A) are met, that is, if the merchandise is transformed in the territory of Canada so that the non originating materials (foreign thread) undergo a change in tariff classification as described in subdivision (t) or satisfies the rules set forth in subdivisions (r), (s), and (t) of this note.

General Note 12(t), Chapter 63, rule 4, states as follows:

4. A change to heading 6304 through 6310 from any other chapter, **except** from headings 5106 through 5113, 5204 through 5212, 5307 through 5308 or 5310 through 5311, **chapters 54** through 55 or headings 5801 through 5802 or 6001 through 6002, provided that the good is both cut (or knit to shape) and sewn or otherwise assembled in the territory of one or more of the NAFTA parties. (Emphasis supplied)

It is our understanding that the foreign thread used to construct the textile pouch is of synthetic fiber and would thus be classifiable as "sewing thread" at subheading 5401.10.0000, HTSUSA. Inasmuch as the textile pouch is classifiable in subheading 6307.90.9989, HTSUSA, and General Note 12(t), Chapter 63, specifically states that sewing thread of Chapter 54 is excepted by subdivision (t), Chapter 63, Rule 4, it is our determination that the subject thread does not undergo the requisite change in tariff classification.

You have asserted that application of the *de minimis* rule (General Note 12(f)) would qualify the merchandise for NAFTA treatment because the foreign thread constitutes less than seven percent of the total weight of the good. However, the *de minimis* rule is not applicable in this case.

We have already determined that the "Backflex Cover & Belt Clip" is classifiable in a textile provision, subheading 6307.90, HTSUSA. As such, General Note 12(t), Chapter Rule 1 to Chapter 63 is applicable and states:

> For the purposes of determining origin of a good of this chapter, the rule applicable to that good shall only apply to the component that determines tariff classification of the good and such component must satisfy the tariff change requirements set out in the rule for the good.

In HQ 959863, dated October 31, 1996, it was the fabric of a cloth covered hanger, comprised of a wooden hanger, foam padding, and fabric, that caused the article to be classified in a textile provision at subheading, 6307.90, HTSUSA. In determining whether or not the good was NAFTA originating, it was necessary to consider the fact that the fabric had determined the tariff classification (General Note 12(t), Chapter Rule 1 to Chapter 63). This resulted in the good being denied the NAFTA preference because the fabric was foreign.

In applying General Note 12(t), Chapter Rule 1 to Chapter 63, to the instant case, it is the fabric, not the thread of the textile pouch that determines tariff classification of this article under a textile provision, subheading 6307.90.9989, HTSUSA. Thus, in determining whether or not the good is NAFTA originating, it would be the fabric and not the thread that would be subject to a *de minimis*

analysis. However, we do not need to apply the *de minimis* rule because the fabric forming the textile pouch is wholly formed in the United States. As such, the fabric determines origin of the good and based on the foregoing, it is our determination that the subject merchandise is a NAFTA originating good under General Note 12(b), HTSUSA. NY E88017 was incorrect in determining that the merchandise did not qualify for preferential treatment under the NAFTA.

*Holding:*

NY E88017, dated October 15, 1999, is hereby modified.

The subject merchandise is correctly classified in subheading 6307.90.9989, HTSUSA, which provides for, Other made up articles including dress patterns: Other: Other: Other, Other: Other." There is no textile restraint category.

The product does qualify for the "Special" "CA" duty free treatment under the NAFTA.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, we suggest that your client check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) categories, your client should contact the local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

The holding set forth above applies only to the specific factual situation and merchandise identified in the ruling request. This position is clearly set forth in section 19 C.F.R. Sections 177.9(b)(1) and 181.100(a)(2)(i). These sections state that a ruling letter is issued on the assumption that all of the information furnished in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect.

Should it be subsequently determined that the information furnished is not complete and does not comply with 19 C.F.R. Sections 177.9(b)(1) and 181.100(a)(2)(i), the ruling will be subject to modification or revocation. In the event there is a change in the facts previously furnished, this may affect the determination of country of origin. Accordingly, if there is any change in the facts submitted to Customs, it is recommended that a new ruling request be submitted in accordance with 19 C.F.R. Section 177.2 and/or Section 181.93.

NY E88017 dated October 15, 1999, is hereby modified. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

## REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN WESTERN RED CEDAR BOARDS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and treatment relating to the classification of certain Western Red Cedar boards.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, 19 U.S.C. 1625(c), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of certain Western Red Cedar boards or "short boards". Similarly, Customs is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of November 15, 2000, Vol. 34, No. 46. Three comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after April 9, 2001.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Branch: (202) 927-1031.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. §1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, col-

lect accurate statistics and determine whether any other applicable legal requirement is met.

In Headquarters (HQ) 082694, dated April 11, 1989, certain Western Red Cedar boards, also referred to as "short boards," were classified under subheading 4418.50.0040, HTSUS, which addressed "Builders' joinery and carpentry of wood, including...shingles and shakes." Customs concluded in HQ 082694 that the Western Red Cedar "short boards" measuring eighteen to twenty-four inches long, with random widths and having a thickness between five-eighths of an inch and one and one-fourth inches, possessed the essential character of complete or finished shingles pursuant to General Rule of Interpretation 2 (a).

It is now Customs position that the Western Red Cedar boards or "short boards" of the dimensions previously addressed are properly classified in subheading 4407.10.0068 which addresses wood sawn or chipped lengthwise of a thickness not exceeding 6 mm, Western Red Cedar. *See also* HQ 085187, *reconsidered in* HQ 964202. The Western Red Cedar boards are material rather than incomplete or unfinished shingles. The boards do not have the essential character of complete or finished shingles. They have not been advanced to a stage in which they are dedicated commercially and practically to the manufacture of complete or finished shingles. HQ 964446 revoking HQ 082694 is set forth as "Attachment " to this document.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 082694 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964446. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

During the notice and comment period, Customs received three comments. The initial comment addressed countervailing duty issues involving Canadian lumber imports, but was non-responsive to the issue of Customs proposed classification. The second comment disagreed with Customs proposed classification, but did not provide support for the position asserted. The principle focus of the second comment was perceived problems with the United States – Canada Softwood Lumber Agreement. The third comment received supported the position of the Customs Service and offered legal analysis. Customs, subsequent to reviewing the comments, chose to proceed with this Notice of Revocation.

As stated in the Notice of Proposed Revocation, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously ac-

corded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may
raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: January 15, 2001.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

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[ATTACHMENT]

*January 15, 2001*
CLA-2 RR:CR:TE 964446 jsj
Category: Classification
Tariff No. 4407.10.0068

MR. KEVIN R. REDL
SECRETARY – TREASURER
ANGLO-AMERICAN CEDAR PRODUCTS LTD.
*7160 Beatty Street*
*Mission, British Columbia*
*Canada V2V 4M6*

Re: Reconsideration of HQ 082694; Western Red Cedar "short boards"; Subheadings 4407.10.0068 and 4418.50.0010; General Rule of Interpretation 2 (a); Unfinished shakes and shingles.

DEAR MR. REDL:

The purpose of this correspondence is to advise you that the United States Customs Service has reconsidered Headquarters Ruling Letter 082694 issued to Anglo-American Cedar Products Ltd. (Anglo-American) on April 11, 1989. The article in issue in HQ 082694 was Western Red Cedar "short boards."

The Customs Service classified Western Red Cedar "short boards" in HQ 082694

in subheading 4418.50.0040[1] of the Harmonized Tariff Schedule of the United States (HTSUS). It is the conclusion of the Customs Service, subsequent to a review of HQ 082694, that the classification of Western Red Cedar "short boards" in subheading 4418.50.0040 was incorrect. The correct subheading is 4407.10.0068, HTSUS.

Pursuant to section 625 (c), Tariff Act of 1930, as amended,19 U.S.C. 1625 (c), notice of the proposed revocation of HQ 082694 was published on November 15, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 46. During the notice and comment period, Customs received three comments. The initial comment addressed countervailing duty issues involving Canadian lumber imports, but was non-responsive to the issue of Customs proposed classification. The second comment disagreed with Customs proposed classification, but did not provide support for the position asserted. The principle focus of the second comment was perceived problems with the United States – Canada Softwood Lumber Agreement. The third comment received supported the position of the Customs Service and offered legal analysis.

The Customs Service, subsequent to reviewing the comments and pursuant to the following analysis, is revoking HQ 082694.

*Facts:*

The articles in issue, identified as Western Red Cedar "short boards", were described in HQ 082694 as "boards...5/8 to 1-1/4 inches thick, 18 inches or 24 inches in length, and in random widths."

*Issue:*

Are the articles in issue, identified as Western Red Cedar "short boards", unfinished shakes or shingles pursuant to General Rule of Interpretation 2 (a) ?

*Law and Analysis:*

The classification of imported merchandise pursuant to the Harmonized Tariff Schedule of the United States is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." GRI 1 further provides that merchandise which can not be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation in their sequential order.

The principal HTSUS subheadings considered by the Customs Service in rendering this reconsideration were: (1) 4407.10.0068; and (2) 4418.50.0010. Subheading 4407.10.0068 provides:

4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding 6mm:

4407.10.00 Coniferous

4407.10.0068 Other:
Not treated:
Other:
Western red cedar:
Rough[2].

Subheading 4418.50.0010 provides:

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[1] The statistical suffix has changed since 1989. HTSUS subheading 4418.50.0040 as it appeared in 1989 is currently 4418.50.0010.

[2] The term "rough" is defined in Statistical Note 1 to Chapter 44 HTSUS to include "wood that has been edged, resawn, crosscut or trimmed to smaller sizes." The Note continues that the term "rough" does not include wood that has been dressed or surfaced by planing on one or more edges or faces or has been edge-glued or end-glued."

4418 Builders' joinery and carpentry of wood, including cellular wood panels and assembled parquet panels; shingles and shakes:

4418.50.00 Shingles and shakes

4418.50.0010 Shingles:
Of western red cedar.

It is the conclusion of the Customs Service that the Western Red Cedar "short boards" in issue are properly classified pursuant to GRI 1. The "short boards" literally satisfy the dictates of heading 4407 because they are "[w]ood sawn or chipped lengthwise ...of a thickness exceeding 6 mm."

Heading 4407 was drafted to be a broad provision for the classification of material. The Explanatory Notes (EN) of the Harmonized Commodity Description and Coding System lend support to this proposition. The Explanatory Notes represent the official interpretation of the HTSUS at the international level. Although the EN's are not law in the United States and the Customs Service is not, therefore, legally obligated to follow them, they are valued as an interpretative aid. *See* T.D. 89–80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989).

The breadth of heading 4407 is evidenced from a reading of EN 44.07. The Explanatory Notes to Chapter 44 of the HTSUS provide that heading 4407 encompasses, "with few exceptions...all wood and timber, of any length but of a thickness exceeding 6mm, sawn or chipped along the general direction of the grain or cut by slicing or peeling." The EN further states that "[s]uch wood and timber includes *sawn* beams, planks, flitches, *boards*, laths, etc." (Emphasis added.) Explanatory Note 44.07.

General Rule of Interpretation 2 (a) provides that any reference in a HTSUS heading to an article "shall be taken to include a reference to that article incomplete or unfinished." GRI 2 (a) requires, however, that the incomplete or unfinished article have the "essential character" of the complete or finished article.

The General Rules of Interpretation do not define the phrase "essential character", however, its meaning may be understood from an examination of the Explanatory Notes to GRI 2(a). The EN's to GRI 2 (a) draw a distinction between a "blank" which possesses the essential character of an article and a "semi-manufacture[d]" item that does not have tne essential character of an article.

A "blank," as defined in the EN, is an article "not ready for direct use, having the approximate shape or outline of the finished article or part." The EN continues stating that a "blank" is an article "which can only be used, other than in exceptional cases, for completion into the finished article or part." A plastic bottle preform is offered in the EN as an example of a blank. Bottle preforms of plastic are "intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape."

"Semi-manufactures" are items that do not yet have the essential shape or character of the finished articles. Examples of semi-manufactures set forth in the EN's are: "bars, discs, tubes, etc." Semi-manufactures are specifically not regarded as "blanks."

A review of the description of the Western Red Cedar boards or "short boards," in the condition in which they will be imported, reveals semi-manufactured items rather than blanks. The boards do not have the essential character of shakes or shingles. The adjective "short," it should be noted, is an industry term that simply refers to lengths of sawn timber, generally less than six feet long.

A shake, as described by EN 44.18, is "wood split by hand or machine from a bolt or block. Its face reveals the natural texture of the wood resulting from the splitting process. Shakes are sometimes sawn lengthwise through their thickness to obtain two shakes, each then having a split face and a sawn back." The Complete Dictionary of Wood defines "shakes" as "[h]and riven ½-in. shingles, longer than normal, and often staggered for special effect." Corkhill, *The Complete Dictionary of Wood*, 501 (1979). Reference to the World Wide Web site of Anglo-

American suggests that the principal distinction between a shake and a shingle is that shakes have a "natural split face, and a sawn backside" while shingles are "sawn on both sides and produce a smooth finished look." Anglo-American Cedar Products Ltd., www.angloamerican.com/products.htm, visited Sept. 14, 2000.

A shingle, as defined in the EN's to heading 4418, is "wood sawn lengthwise which is generally thicker than 5mm at one end (the butt) but thinner than 5mm at the other end (the tip). It may have its edges resawn to be parallel; its butt may be resawn to be at right angles to its edges or to form a curve or other shape. One of its faces may be sanded from the butt to the tip or grooved along its length." *See also*, Corkhill, *The Complete Dictionary of Wood*, 504 (1979).

The boards that were the subject of HQ 082694 issued to Anglo-American in 1989 have not been sufficiently processed beyond the stage of material lumber. They are rectangular lumber boards sawn to size. They are not tapered to any degree, nor are they in a condition in which they may be deemed dedicated to use only as shakes or shingles. They do not have the approximate shape or outline of a shake or shingle and are more closely analogous to the examples of semi-manufactured items in the EN's than to the plastic bottle preform identified as the example of a blank. The "short boards" in issue are plain sawn wood suitable for multiple uses and not recognizable as one particular article of commerce. *See generally, Ludvig Svensson (US) v. United States*, 62 F. Supp. 2d 1171 (C.I.T.1999); *Doherty-Barrow of Texas, Inc. v. United States*, 3 C.I.T. 228 (1982); and *American Import Co. v. United States*, 26 C.C.P.A. 72 (1938).

The Customs Service is apprised of HQ Ruling Letter 083795 issued on May 26, 1989. HQ 083795 classified Red Cedar "short boards" in HTSUS subheading 4418.50.0040 as unfinished shakes and shingles. It is specifically noted that the articles in issue in that ruling letter, in the condition as imported, possessed the approximate shape or outline of a shingle. The sample was a tapered board measuring eighteen and one-fourth inches in length and ten and eleven-sixteenth inches in width. The tip of the board measured nine-thirty-seconds of an inch (7 mm) and the bottom or butt measured seven-eighths of an inch (22mm). HQ 083795 is, therefore, distinguishable from HQ 082694.

*Holding:*

Headquarters Ruling Letter 082694 has been reconsidered and it is the conclusion of the Customs Service that the merchandise was incorrectly classified. The correct classification of the Western Red Cedar boards or "short boards" in issue is 4407.10.0068, HTSUS.

The general column one duty rate is Free.

Headquarters Ruling Letter 082694 dated April 11, 1989, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

# United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

*Chief Judge*

Gregory W. Carman

*Judges*

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Ann Ridgway
Richard K. Eaton

*Senior Judges*

James L. Watson
Hebert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave

*Clerk*

Leo M. Gordon

# Decisions of the United States Court of International Trade

(Slip Op. 01–1)

FAG ITALIA S.P.A. BARDEN CORPORATION (U.K.) LIMITED, THE BARDEN CORPORATION AND FAG BEARINGS CORPORATION, PLAINTIFF *v.* UNITED STATES, DEFENDANT, THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Court No. 98–07–02528

(Dated January 9, 2001)

JUDGMENT

TSOUCALAS, *Senior Judge*: This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court Remand, *FAG Italia S.p.A., The Barden Corporation (U.K.) Ltd., The Barden Corporation and FAG Bearings Corporation v. United States*, 24 CIT ___, 110 F. Supp. 2d 1055 (2000) ("Remand Results"), Torrington's comments to the Remand Results, and Commerce having complied with the Court's remand, and no other responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on November 2, 2000, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 01–2)

NOVOSTEEL SA, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORPORATION; U.S. STEEL GROUP, A UNIT OF USX CORPORATION, DEFENDANT-INTERVENORS

Court No. 99–05–00299

[Plaintiff's Rule 56.2 motion for judgment on the agency record is denied. Commerce's final scope determination is sustained.]

Plaintiff moves for judgment upon the agency record pursuant to U.S. CIT R. 56.2, contending the United States Department of Commerce's (Commerce) determination that profile slabs imported by the Plaintiff are within the scope of antidumping and countervailing duty orders on certain cut-to-length carbon steel plate from Germany is not supported by substantial evidence on the record and is otherwise not in accordance with law.

Defendant, and Defendant-Intervenors oppose Plaintiff's motion, asserting Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law.

*Held:* This Court holds that Commerce's final scope determination is supported by substantial evidence on the record and is otherwise in accordance with law.

(Dated January 18, 2001)

*Edmund Maciorowski, P.C.* (*Edmund Maciorowski, Pamela L. St. Peter*), Bloomfield Hills, Michigan, for Plaintiff.

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Bernd G. Janzen*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

*Dewey Ballantine LLP* (*Michael H. Stein, Bradford L. Ward, Michael Castellano, Joon Y. (Peter) Kim*) Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge*: Plaintiff, Novosteel SA (Novosteel), an importer of steel profile slabs produced in Germany by Reiner Brach GmbH & Co. KG (Reiner Brach), challenges an unpublished scope determination issued by the United States Department of Commerce (Commerce) finding Reiner Brach's profile slabs are within the class or kind of merchandise covered by the antidumping and countervailing duty orders on certain cut-to-length carbon steel plate from Germany. *See Final Scope Determination Regarding Profile Slabs – Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini (May 18, 1999) (*Final Scope Determination*). Plaintiff moves for judgment upon the agency record pursuant to U.S. CIT R. 56.2, contending Commerce's *Final Scope Determination* is not supported by substantial evidence on the record and is otherwise not in accordance with law.

Defendant and Defendant-Intervenors oppose Plaintiff's motion, contending Commerce's *Final Scope Determination* should be sustained.

This Court denies Plaintiff's motion for judgment upon the agency record. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994).

## BACKGROUND

On August 17 and August 19, 1993, respectively, the Department of Commerce published countervailing and antidumping duty orders on cut-to-length carbon steel plate from Germany. *See Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 Fed. Reg. 43,756 (Aug. 17, 1993) (*CVD Order*), and *Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Germany*, 58 Fed. Reg. 44,170 (Aug. 19, 1993) (*AD Order*)[collectively "*Plate Orders*"]. These two orders, in relevant part, defined "certain cut-to-length carbon steel plate" to include:

> certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness . . . .

*CVD Order*, 58 Fed. Reg. at 43,758; *AD Order*, 58 Fed. Reg. at 44,170 (defining the scope by reference to "Appendix I to the Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina (58 FR 37,062, July 9, 1993).").[1] The scope of the *Plate Orders* also listed various subheadings within headings 7208, 7210, 7211, and 7212 of the Harmonized Tariff Schedule of the United States (HTSUS), under which the subject merchandise was classifiable.

Novosteel began importing Reiner Brach profile slab from Germany into the United States through its wholly owned subsidiary Barzelex, Inc. (Barzelex) in June, 1994. Prior to importing the goods into the United States, Barzelex obtained a Custom's Ruling Letter classifying Reiner Brach's product under heading 7207, HTSUS, as "semifinished products of iron or non-alloy steel." *Ruling Letter 896625: The Tariff Classification of Profiling Slabs from Germany* (Customs Service Apr. 21, 1994). From June, 1994, to July, 1998, Barzelex im-

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[1] The scope of the countervailing and antidumping duty orders on cut-to-length carbon steel plate from Germany was identical to the scope set forth in the final determinations. *Compare Countervailing Duty Orders and Amendment to Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 Fed. Reg. 43,756 (Aug. 17, 1993) (*CVD Order*), *with Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany*, 58 Fed. Reg. 37,315, 37,315 (July 9, 1993)(*CVD Final Determination*) (defining investigation's scope by reference to "the 'Scope Appendix' to the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria [, 58 Fed. Reg. 37,217, 37,225 (July 9, 1993)].") The amended final determinations (*Plate Orders*) corrected certain ministerial errors unrelated to the scope description.

ported Reiner Brach profile slabs into the United States under heading 7207. (Plaintiff, Novosteel SA's Motion and Brief in Support of Its Motion Under Rule 56.2 for Judgment Upon the Agency Record (Pl.'s Br.) at 6.) Because heading 7207, HTSUS, was not within the scope of the plate orders, Customs did not require the deposit of estimated antidumping or countervailing duties on the profile slabs at the time of entry. In June, 1998, the import specialists for the Ports of Philadelphia and Cleveland first informed Barzelex that a review of its entries determined the slabs to be within the scope of the *Plate Orders*. (*Id.*) The Port of Cleveland import specialist advised Novosteel to file a scope inquiry with the Department of Commerce pursuant to 19 C.F.R. § 351.225 (1998). (*Id.* at 7.) From August 3, 1998 until February 19, 1999, Novosteel effectuated 14 entries of Reiner Brach profile slab, each of which was rejected by the Customs Service.[2] (*Id.* at 12.) No additional entries were made after February 19, 1999. (*Id.*)

On August 17, 1998, Novosteel initiated a scope inquiry pursuant to 19 C.F.R. § 351.225(c) (1998).[3] Commerce issued its preliminary scope determination on March 23, 1999, concluding Reiner Brach profile slab was within the scope of the antidumping and countervailing duty orders on certain cut-to-length carbon steel plate from Germany. *See Preliminary Scope Determination Regarding Profile Slabs – Antidumping and Countervailing Duty Orders on Certain Cut-to-Length Carbon Steel Plate from Germany*, U.S. Department of Commerce Internal Memorandum from Roland MacDonald to Joseph Spetrini (Mar. 23, 1999) (*Preliminary Scope Determination*). Following the submission of comments by Novosteel and domestic producers, Commerce issued its *Final Scope Determination* on May 18, 1999.

In its *Final Scope Determination*, Commerce determined that "based upon a review of the underlying record – the petition, the Department and ITC determinations, and the orders . . . the profile slabs . . . are hot-rolled carbon steel products meeting the dimensional characteristics of subject merchandise." *Final Scope Determination* at 3. However, Commerce was "unable to conclude by reference to the underlying scope descriptions whether these slabs also qualify as flat-rolled[4] products covered by the orders." *Id.* Because Commerce could not determine whether Reiner Brach profile slab was within the scope of the *Plate Orders* based on its review of the petition and other rel-

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[2] Protests were filed against the rejection of those entries. The protests were denied. A summons and complaint have been filed in this matter under Court No. 99–09–00613. (Plaintiff, Novosteel SA's Motion and Brief in Support of Its Motion Under Rule 56.2 for Judgment Upon the Agency Record (Pl.'s Br.) at 12, n. 19.)

[3] The regulation that governed Commerce's scope determination in this case, 19 C.F.R. § 351.225 (1998), became effective June 18, 1997, and is applicable to scope inquiries commenced after that date. *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,295, 27,403–05 (Dep't. Comm. May 19, 1997) (final rule). Section 351.225(c) provides that "[a]ny interested party may apply for a ruling as to whether a particular product is within the scope of an order[.]"

[4] Throughout this opinion this Court will make references to "flat-rolled," "finished," "plate," "slab," and "semi-finished" products. The terms "plate," "flat-rolled," and "finished" should be understood to represent overlapping sets of products. Similarly, the terms "slab" and "semi-finished" are also interchangeable.

evant documents, it applied the *Diversified Products*[5] criteria. Based upon its review of the physical characteristics, ultimate use, expectations of ultimate purchasers, channels of trade, and manner of advertising and display of Reiner Brach's profile slab, Commerce determined Reiner Brach profile slab is of the same class or kind of merchandise as certain cut-to-length carbon steel plate and, therefore, falls within the scope of the *Plate Orders*. *See Id.*

CONTENTIONS OF THE PARTIES

A. *Plaintiff*

Plaintiff raises two primary arguments in challenging Commerce's *Final Scope Determination*. First, Plaintiff argues the record established before Commerce unambiguously excludes Reiner Brach profile slabs from the scope of the *Plate Orders*. Plaintiff contends this should have ended Commerce's inquiry, rendering a *Diversified Products* analysis superfluous. (Pl.'s Br. at 17.) Plaintiff maintains there is "ample evidence to establish that Reiner Brach slab is not 'flat-rolled' as required by the order[s]," and, is, therefore, unambiguously outside the scope of the orders. (*Id.* at 18.)

Second, Plaintiff asserts Commerce reached a determination that is not supported by substantial evidence on the record in concluding Reiner Brach's profile slab is of the same class or kind of merchandise as flat-rolled cut-to-length carbon steel plate based on its application of the *Diversified Products* criteria. (*Id.* at 21.) Plaintiff contends Reiner Brach's profile slab is a "semi-finished" steel product which does not share the same physical characteristics, ultimate use, expectations of ultimate purchasers, channels of trade, or manner of advertising and display as the cut-to-length carbon steel plate that was the subject of the investigations by Commerce and the ITC. (*Id.*)

B. *Defendant*

Defendant rejects Plaintiff's contentions and argues this Court should deny Plaintiff's motion for judgment upon the agency record. Defendant asserts Commerce's *Final Scope Determination* is supported by substantial evidence on the record and is otherwise in accordance with law. Defendant raises two primary arguments in support of this assertion.

First, Defendant argues Commerce properly concluded the definition of cut-to-length carbon steel plate contained in the petition, ini-

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[5] In *Diversified Products Corp. v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983), this Court reviewed, and ultimately upheld, Commerce's consideration of five factors in determining whether merchandise under review was of the "same class or kind" as merchandise explicitly within the scope of an outstanding antidumping duty order: (1) the physical characteristics of the merchandise; (2) the expectations of the ultimate purchasers; (3) the ultimate use of the merchandise; (4) the channels of trade in which the merchandise moves; and (5) cost. These criteria have been codified at 19 C.F.R. § 351.225(k)(2) (1998), and are utilized by Commerce when an examination of the petition, initial investigations and determinations of Commerce and the ITC do not resolve definitively whether certain merchandise is within the scope of an outstanding antidumping and/or countervailing duty order. *See* 19 C.F.R. § 351.225(k)(1) & (2). The fifth factor in the regulation now considers "[t]he manner in which the product is advertised and displayed," a change from the original factor of "cost." This difference does not alter the analysis required by *Diversified Products*.

tial investigations, and determinations of Commerce and the ITC did not definitively resolve whether Reiner Brach's profile slab was within the scope of the *Plate Orders*. Defendant notes that although "it is undisputed that Reiner Brach's profile slabs are hot-rolled carbon steel products of rectangular shape that meet the dimensional specifications of the plate orders," Commerce found it was unclear "whether Reiner Brach's profile slabs could also be characterized as finished, flat-rolled products." (Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record (Def.'s Br.) at 19–20.) Defendant contends that based on Commerce's conclusion that the underlying scope record was not dispositive of the issue, Commerce properly resorted to an analysis utilizing the *Diversified Products* criteria.

Second, Defendant maintains Commerce's conclusion that Reiner Brach profile slab is within the scope of the *Plate Orders*, based on the *Diversified Products* criteria, is supported by substantial evidence on the record and is otherwise in accordance with law. (*Id.* at 28.)

C. *Defendant-Intervenors*

Because this Court finds Defendant-Intervenors' arguments in this matter substantially similar to those presented by the Defendant, this Court will not recount them in this opinion, although they have been duly considered.

## Standard of Review

In reviewing a scope determination, this Court must sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), *quoting, Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Substantial evidence "does not mean a large or considerable amount of evidence." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It is "less than a preponderance, but more than a scintilla." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999). This Court will sustain Commerce's determination "if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 1020, 1023 (1992), *citing, Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1561 (Fed. Cir. 1984).

## Discussion

Plaintiff's challenge to Commerce's *Final Scope Determination* raises two issues: (1) whether Commerce properly resorted to application of

the *Diversified Products* criteria; and (2) whether Commerce's *Diversified Products* analysis is supported by substantial evidence on the record. The Court will address these issues in turn.

A. *Whether Commerce Properly Resorted to Application of the Diversified Products Criteria*

Initially, the Court notes "[t]he Commerce Department enjoys substantial freedom to interpret and clarify its antidumping duty orders. But while it may interpret those orders, it may not change them." *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995), *citing, Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990). In considering whether a particular product is included within the scope of an existing order, the applicable regulation directs Commerce to first examine "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1) (1998). "When the above criteria are not dispositive, [Commerce] will further consider . . ." the so-called *Diversified Products* criteria. 19 C.F.R. § 351.225(k)(2) (1998). As noted previously, the *Plate Orders*, in relevant part, define cut-to-length carbon steel plate to include:

> Certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness . . . .

*CVD Order*, 58 Fed. Reg. at 43,758; *AD Order*, 58 Fed. Reg. at 44,170 (defining the scope by reference to "Appendix I to the Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina (58 FR 37,062, July 9, 1993).").

Plaintiff argues that the record in this matter unambiguously excludes Reiner Brach profile slab from the scope of the *Plate Orders*, and, therefore, Commerce improperly resorted to application of the *Diversified Products* criteria. Defendant and Defendant-Intervenors respond that Commerce properly applied the *Diversified Products* criteria after concluding the petitions, initial investigations, and determinations of Commerce and the ITC were not dispositive as to whether Reiner Brach profile slab is within the scope of the *Plate Orders*.

The Court finds Commerce properly resorted to application of the *Diversified Products* criteria. The record neither unambiguously excludes Reiner Brach profile slab from the scope of the *Plate Orders*, nor unambiguously includes Reiner Brach profile slab in the scope of the *Plate Orders*.

Plaintiff initially contends "[n]owhere in the petition was there an

indication, either express or implied, that petitioner's [sic] intended that the class or kind of goods subject to the investigations and resulting Orders should include slab." (Pl.'s Br. at 7.) Plaintiff supports this contention by noting Petitioners did not identify Reiner Brach, Novosteel, or Barzelex as producers, exporters, or importers of the subject merchandise. (*Id.*) Plaintiff also notes the ITC never sent a questionnaire to Reiner Brach, Novosteel, or Barzelex during the course of its material injury investigation. (*Id.* at 8.) Furthermore, Plaintiff maintains profile slab was not considered in Commerce's investigation because it was not among the products specifically listed or described in the notice of initiation of the antidumping and countervailing duty investigations. (*Id.* at 20.)

The Court finds Plaintiff's arguments unpersuasive. As the Department of Commerce noted in its *Final Scope Determination*, "'{t}he absence of a reference in a petition or determination to a particular product, such as profile slab, does not necessarily indicate that it is not covered by the product category subject to an AD or CVD action.'" *Final Scope Determination at 4, quoting Final Scope Ruling – AD and CVD Orders on Cut-to-Length Carbon Steel Plate from Brazil – Request by Wirth Limited for a Ruling on Profile Slab* at 16 (April 2, 1997) *(Wirth's Final Scope Ruling)*. This position is clearly supported by numerous decisions in which this Court has held "a petitioner is not required to circumscribe the entire universe of articles that might possibly be covered by the order it seeks." *Nitta Indus. Corp. v. United States*, 16 CIT 244, 248 (1992), *citing, American NTN Bearing Mfg. Corp. v. United States*, 739 F. Supp. 1555, 1562 (Ct. Int'l Trade 1990); *see also Makita Corp. v. United States*, 974 F. Supp. 770, 777 (Ct. Int'l Trade 1997). Additionally, profile slab is not among those steel products specifically excluded from the scope in the petitions and other relevant documents, further contradicting Plaintiff's claim that Reiner Brach profile slab is unambiguously excluded from the scope of the *Plate Orders. See Petition for the Imposition of Antidumping Duties on Imports of Cut-to-Length Carbon Steel Plate from Germany, reproduced* at Pl.'s App. Tab 1, Ex. 5, at 7–8 (excluding flat carbon steel products and universal mill plate "in coils" and plate "that is clad, or plated or coated with metal" from scope of petitions) (footnotes omitted) (*AD Petition*); *Petition for the Imposition of Countervailing Duties Against Certain Steel Flat Products from Germany, reproduced* at Pl.'s App. Tab 1, Ex. 6, at 17 (same) (*CVD Petition*). The very reason Commerce has provided for regulations governing the conduct of scope inquiries is because "the descriptions of subject merchandise contained in the Department's determinations must be written in general terms." 19 C.F.R. § 351.225(a) (1998). The resulting ambiguities are resolved by resort to a scope inquiry.

Plaintiff continues its argument that Petitioners did not intend profile slab to be included within the scope of the *Plate Orders* by asserting that the various HTSUS headings cited as part of the scope description did not include heading 7207 (under which Customs classi-

fied Reiner Brach profile slab in 1994).[6] (Pl.'s Br. at 9.) Plaintiff maintains "Petitioners described the merchandise included within the order as Cut-to-Length Carbon Steel Plate within the context of HTS[US] nomenclature . . . ." (*Id.* at 7.) This, Plaintiff argues, clearly indicates a lack of intent to include Reiner Brach profile slab within the scope of the *Plate Orders*. (*Id.*)

Again, the Court finds Plaintiff's arguments unpersuasive. First, the Court notes the petitions provide a description of merchandise subject to investigation by reference to several criteria that bear no relation to HTSUS principles. Specifically, the petitions provide dimensional measurements of the subject merchandise that are not associated with the HTSUS. *See AD Petition, reproduced* at Pl.'s App. Tab 1, Ex. 5 at 7–8 (defining cut-to-length carbon steel plate to include "flat carbon steel products of a thickness of 4.75 mm or more" and "universal mill plate, (a flat rolled product with a width exceeding 1,250 mm, and a thickness of not less than 4 mm)"); *CVD Petition, reproduced* at Pl.'s App. Tab 1, Ex. 6 at 17 (same). The petitions also define the scope of subject merchandise by reference to American Iron and Steel Institute (AISI) product categories and American Society for Testing and Materials (ASTM) standard specification numbers. *See AD Petition, reproduced* at Pl.'s App. Tab 1, Ex. 5 at 10, n.21 (referring to Exhibit 4 in the original AD petition); *CVD Petition, reproduced* at Pl.'s App. Tab 1, Ex. 6 at 19, n.42 (referring to Exhibit 6 in the original CVD petition). Second, while Plaintiff is correct that the petitions describe the subject merchandise by reference to several HTSUS headings, petitioners are required by regulation to include these headings. *See* 19 C.F.R. § 353.12(b)(4) (1996) (providing petitions requesting imposition of antidumping duties shall include "[a] detailed description of the merchandise that defines the requested scope of the investigation, including . . . its current U.S. tariff classification number"); 19 C.F.R.§ 355.12(b)(4) (1996) (similar language applying to petitions requesting imposition of countervailing duties). Finally, Commerce specifically stated in the *Plate Orders*, "[a]lthough the Harmonized Tariff Schedule of the United States (HTS) subheadings are provided for convenience and customs purposes, our written descriptions of the scope of these proceedings are dispositive." *CVD Order*, 58 Fed. Reg. at 43,757; *AD Order*, 58 Fed. Reg. at 44,170 (referring to Appendix I to the *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,063 (July 9, 1993)). This Court has held "[t]he inclusion of various HTSUS headings in a petition ordinarily should not be interpreted to exclude merchandise determined to be within the scope of the . . . orders but classified under an HTSUS heading not listed in the petition." *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 977–78 (Ct. Int'l Trade 1998), *aff'd*, 185 F.3d 882 (Fed.

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[6] *See Ruling Letter 896625: The Tariff Classification of Profiling Slabs from Germany* (Customs Service Apr. 21, 1994).

Cir. 1999).

After properly determining that the Reiner Brach profile slabs fall within the scope of the *Plate Orders* to the extent they "are hot-rolled carbon steel products meeting the dimensional criteria of the subject merchandise," Commerce also correctly determined that "reference to the underlying scope descriptions" did not reveal whether the Reiner Brach profile slabs also qualified as "flat-rolled products covered by the orders." *Final Scope Determination* at 3. (footnote omitted).

The definition of "flat-rolled product" used throughout these proceedings is the one adopted by Petitioners.[7] Petitioners defined "flat-rolled product" by reference to the Harmonized Tariff System of the United States (HTSUS), Chapter 72, Note 1(k). Note 1(k), in relevant part, defines "flat-rolled products" as:

> "Rolled products of solid rectangular (other than square) cross section, which do not conform to the definition at (ij) above [semi finished] . . . ."

Note 1(k) excludes those items that are "semi-finished," as defined by HTSUS, Chapter 72, Note 1(ij). Note 1(ij) defines semi-finished products as "[o]ther products of solid section, *which have not been further worked than subjected to primary hot-rolling* or roughly shaped by forging, including blanks for angles, shapes or sections." (emphasis added).

Thus, the issue is whether Reiner Brach profile slab remains a semi-finished product or has been "further worked." Defendant-Intervenors contend "an analysis of 'further worked'," a term derived from the HTSUS, "while instructive, is not determinative of the scope" because "flat-rolled" is the term used in the underlying scope descriptions. (Defendant-Intervenors' Submission of Supplementary Material Requested by the Court (Def.-Intvr.'s Supp. Sub.) at Item III.) The Court agrees with Defendant-Intervenors that the operative term is "flat-rolled" since that is the term used in the narrative scope description. The Court observes, however, that the term "further worked" is helpful in discerning the difference between semi-finished and finished products. The term has been used to distinguish between semi-finished and finished products in every aspect of this scope inquiry to date. The petitions contained a reference to the term, as did the *Preliminary and Final Scope Determinations. See AD Petition* at 6, n.5; *Preliminary Scope Determination* at 5; *Final Scope Determination* at 4.

Defendant-Intervenors argue the term "further worked" is a HTSUS concept and, as was noted in *Wirth*, HTSUS principles are not dispositive in a scope inquiry. (Def.-Intvr.'s Supp. Sub. at Item III.) This characterization is inaccurate. The fact that the definition derives from the HTSUS is irrelevant to whether it is dispositive and the weight this Court will accord the definition. The only reason "further

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[7] The terms Petitioners, Defendant-Intervenors, and Domestic Producers refer to the same parties in this case.

worked" is not dispositive is because "flat-rolled" is the term used in the narrative scope description. As noted previously, the regulation only requires petitioners to include the "U.S. tariff classification number." 19 C.F.R. § 353.12(b)(4) (1996) (relating to antidumping duty petitions); 19 C.F.R. § 355.12(b)(4) (1996) (relating to countervailing duty petitions). There is no similar requirement that petitioners define terms included in the scope description by reference to the HTSUS. If the Petitioners choose to define "flat-rolled product" by reference to the HTSUS, the Court finds it is a factor to be considered, along with all factors pertinent to the issue of the intended scope of the orders. *See Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990).

Additionally, while Defendant-Intervenors cite *Wirth* for the proposition that "further worked" is simply instructive here, the Court in *Wirth* sustained Commerce's final scope ruling using that very term. 5 F. Supp. 2d at 979 ("Commerce's scope determination concludes CST's profile slab is 'not semi-finished, but [rather] a hot-rolled carbon steel product', and thus of the same class or kind as merchandise within the scope of the plate orders, because CST's subjecting profile slabs to hot scarfing and final rolling passes constitutes *further working* of the slab and because CST's profile slab undergoes no further processing before ultimate use.") (internal quotations omitted) (emphasis added). Therefore, the Court finds the term "further worked" helpful in clarifying the meaning of a "flat-rolled product."

No clear definition of the term "further worked" has been advanced by the parties in this case. They offer several definitions from the Additional U.S. Notes and Explanatory Notes to the Harmonized Tariff System for Chapter 72, but an examination of those sources yields no precise and uniform definition of "further worked." *Compare* HTSUS, Chapter 72, Additional U.S. Note 2, *and* Explanatory Notes: Harmonized Commodity Description and Coding System, Ch. 72, General Explanatory Note to Section XV, (IV)(C)(1) (2d ed. 1996) (Explanatory Notes), *with* Explanatory Notes, Ch. 72, subch. II, 72.07(A). There is considerable ambiguity in these definitions. Therefore, the Court finds the correct meaning of the term is "'presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary.'" *Winter-Wolff, Inc. v. United States*, 996 F. Supp. 1258, 1265 (Ct. Int'l Trade 1998), *quoting, Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984).

*Winter-Wolff* involved a challenge of Customs' classification of laser-treated aluminum capacitor foil imported from Switzerland. The Court's decision rested upon the definition of the term "further worked." The Court found that the defendant had not established a definite and uniform commercial meaning for the term and turned to the common meaning. The Court derived this common meaning by combining the separate dictionary definitions of "further" and "worked." *See id.* at 1263. The Court concluded "further worked" meant "to subject an existing product to some process of development, treatment, or manufacture to a greater degree or extent." *Id.* This Court adopts

that definition, modifying it slightly to mean "to subject an existing product to some process of development, treatment, or manufacture beyond primary hot-rolling." This is to ensure it is consistent with the definition above in which a flat-rolled product is "further worked beyond primary hot-rolling."

Record evidence suggests that Reiner Brach possesses equipment capable of "subjecting an existing product to some process of development, treatment, or manufacture beyond primary hot-rolling," thereby creating finished, flat-rolled products. Five pieces of evidence support this conclusion, contradicting Plaintiff's assertion that Reiner Brach's profile slabs receive only "primary hot-rolling." First, Reiner Brach published a sales brochure indicating: (1) the profile slabs were intended "to augment the shrinking supply of very expensive thick plate on the world steel markets"; (2) the facility uses "a hydraulic press as well as a five-roll flattening machine to back up [the] guaranty" of "[f]latness within close tolerances . . ."; and (3) the product meets flatness tolerances "acc[ording] to international standards, with excellent surface." *Final Scope Determination* at 4, *citing Reiner Brach Sales Brochure, reproduced* at Pl.'s App. Tab 4, Att. B, at 1–3 (Sales Brochure). Second, Defendants note the profile slab is produced at a facility "commonly described as a two high reversing mill." (Pl.'s Br. at 3.) A two high reversing mill is a type of plate mill, capable of manufacturing plate products. *See The Making, Shaping, and Treating of Steel* 864–65 (Lankford *et al.* eds., 10th ed. 1985) Third, Reiner Brach profile slab is used as a finished product substitutable for heavy plate. (Defendant-Intervenors Brief in Opposition to Plaintiff's Motion Under Rule 56.2 for Judgment Upon the Agency Record (Def.-Intvr.'s Br. at 20.) Finally, Defendant-Intervenors argue the "ultrasonic testing [ ] performed manually on each finished slab to provide [Reiner Brach's] customers with internal integrity assurance" provides further evidence of efforts to ensure a finished product is being produced. *Reiner Brach Sales Brochure, reproduced* at Pl.'s App. Tab 4, Att. B, at 1–3.

The Court declines to re-weigh the record evidence as Plaintiff urges. Under the applicable substantial evidence standard of review, the agency rather than the reviewing court weighs the evidence and determines its credibility. Plaintiff argues the Sales Brochure is not credible evidence and that "Reiner Brach's mention of a flattening machine in their flyer is not evidence that a flattening machine was utilized in the production of Reiner Brach slab." As Defendant-Intervenors correctly note, the Reiner Brach Sales Brochure contains material specifically relating to Reiner Brach profile slab and was created prior to any litigation in this matter. Reiner Brach has never disclaimed the Sales Brochure and Plaintiff concedes it distributed the Sales Brochure to U.S. customers. *See Novosteel Questionnaire Response, reproduced* at Pl.'s App. Tab 9, at 27. It is clear that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfrs. Inst., Inc. v.*

*Donovan*, 452 U.S. 490, 523 (1981) (internal citations and quotation marks omitted). Defendant properly notes, "[t]he question . . . is whether a reasonable person could have drawn the inference that Reiner Brach employs a flattening machine based upon the fact that Reiner Brach claims so much in its own marketing materials." (Def.'s Br. at 32, *citing Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).)

Therefore, Plaintiff's reliance upon *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), a Customs classification case requiring *de novo* review by the Court, is misapplied. Plaintiff contends the Reiner Brach Sales Brochure relied upon by both Defendant and Defendant-Intervenors is not credible evidence unless there is additional corroborating evidence. (Pl.'s Br. at 18, *citing G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990)). Plaintiff characterizes the brochure as a "one page sales flyer" and submits it is inadequate to support Commerce's conclusion because it does not rise to the level of substantial evidence. (Pl.'s Br. at 18; Plaintiff's Reply Brief to Defendant's and Defendant-Intervenor's Brief in Opposition to Plaintiff's Motion Under CIT Rule 56.2 for Judgment Upon the Agency Record (Pl.'s Rep. Br.) at 3.) There are two flaws in Plaintiff's argument. First, *G. Heileman*, a classification case, is simply not on point. Second, Plaintiff's interpretation of the holding in *G. Heileman* is incorrect. This Court cannot identify any portion of that opinion stating, as asserted by Plaintiff, that "the credibility of such documents [as the Reiner Brach Sales Brochure] has long been discredited by this Court in the absence of additional corroborating evidence." (Pl.'s Br. at 18.) To the contrary, *G. Heileman* specifically recognizes that, although not conclusive, "[i]n determining the classification of imported merchandise, the descriptions of the merchandise contained in marketing literature is relevant evidence." 14 CIT at 621, *citing, B & E Sales Co. v. United States*, 9 CIT 69, 76 (1985). The Court finds the Reiner Brach Sales Brochure is relevant evidence upon which Commerce may rely in making its determination.

In addition, the Court refuses to limit "further worked" to those production processes outlined in *Wirth's Final Scope Ruling and Wirth Ltd. v. United States*, 5 F. Supp. 2d 968 (Ct. Int'l Trade 1998). *Wirth* involved a scope inquiry to determine whether profile slab from Brazil was within the class or kind of merchandise covered by the antidumping and countervailing duty orders on certain cut-to-length carbon steel plate from Brazil. The scope of the orders on certain cut-to-length carbon steel plate from Brazil was identical to that of the *Plate Orders* in this case.[8] In *Wirth's Final Scope Ruling*, Commerce con-

[8] *Compare Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Germany*, 58 Fed. Reg. 44,170, 44,170 (Aug. 19, 1993), *with Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Brazil*, 58 Fed. Reg. 37,091, 37,092 (1993). Both define the investigations' scope by reference to Appendix I to the *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,064 (1993).

cluded "CST's production process for the subject profile slab (initial rolling, followed by hot scarfing, followed by final rolling) must effectively further work CST's product . . . [t]herefore, the resulting product is not 'semi-finished' but a hot-rolled carbon steel product." *Wirth's Final Scope Ruling* at 13. This Court sustained Commerce's decision in *Wirth Ltd. v. United States*. See 5 F. Supp. 2d at 979. Plaintiff argues Commerce's determination in *Wirth's Final Scope Ruling*, and this Court's decision in *Wirth* sustaining Commerce's final scope ruling, are controlling in this case. Plaintiff goes so far as to argue "the CIT opinion in *Wirth Limited* must properly be relied on as precedent." (Pl.'s Rep. Br. at 11.) Plaintiff contends only those production processes outlined in *Wirth's Final Scope Ruling* and *Wirth* can constitute "further working." (Pl.'s Br. at 25.) Commerce is not required to look to the processes of *Wirth* in order to find substantial evidence of ambiguity as to whether Reiner Brach's profile slab is included within the scope of the *Plate Orders*. The Court cannot identify, nor has Plaintiff demonstrated, where in *Wirth's Final Scope Ruling* or in this Court's decision in *Wirth*, Commerce or this Court stated only those production processes identified therein would constitute "further working." The Court will not limit the scope of the orders on cut-to-length carbon steel plate by providing for a finite set of production processes that may be used to manufacture plate, despite Plaintiff's attempts to have the Court adopt such a limitation.

Commerce, similarly, is not limited to the sequence of events that Plaintiff lists from the treatise, *The Making, Shaping, and Treating of Steel*. (*Id.* at 23.) The treatise indicates the "traditional sequence of events in plate (*i.e.* flat-rolled) production is: (1) rolling ingot into slab; (2) cooling the slab; (3) removing defects from slab by an operation known as conditioning, *i.e.* hot scarfing; and (4) converting slab into plate by reheating and further hot working by rolling." (Pl.'s Br. at 23, *quoting The Making, Shaping, and Treating of Steel*, 701–702); *See also Preliminary Scope Determination* at 6. Plaintiff maintains none of the processes that constitute step number three, "conditioning," are ever performed on Reiner Brach profile slab, and, therefore, it may not be considered "further worked." (Pl.'s Br. at 23.)

Commerce specifically noted "[t]he reference (*The Making, Shaping, and Treating of Steel*) recognizes, however, that 'there are some important variations from this sequence of events . . . [I]t is possible, and often quite economical, to roll ingots directly, through the bloom, slab, or billet stage into more refined and even finished steel products . . . . [T]his process involves one continuous operation which may frequently be done without reheating.'" *Preliminary Scope Determination* at 6, *quoting The Making, Shaping, and Treating of Steel*, 702 (10th ed. 1985).) Plaintiff rebuts this by arguing "[t]his conclusion is patently absurd on this record. All that might be said is it's possible to roll ingot into a 'more refined' product (*e.g.* slab, re-roll slab, slab profiles) and finished steel products. It is incontrovertible, on this record, that the subject articles may not be considered 'finished'."

(Pl.'s Rep. Br. at 11–12.)

The Court rejects Plaintiff's argument. *The Making, Shaping, and Treating of Steel* is a recognized treatise in the industry. It clearly indicates there is more than one method by which to create a "flat-rolled" plate product. Commerce also explicitly stated "the language of the scope leaves ample room for a wide variety of finishing/flattening processes; there is simply no requirement that merchandise be, for example, hot scarfed, to be included in the scope." *Final Scope Determination* at 7. The Court finds the evidence cited by Defendants indicates Reiner Brach profile slab may be "further worked" into a finished, "flat-rolled product" in accordance with one of the production processes listed. At the very least the evidence precludes an outright finding that Reiner Brach profile slab receives only primary hot-rolling and is a semifinished product.

This Court finds the record contains substantial evidence supporting Commerce's conclusion that the petitions, initial investigations, and determinations of Commerce and the ITC are ambiguous as to whether Reiner Brach's profile slab is included within the scope of the *Plate Orders*. When the order does not clearly include or exclude the product at issue or the consulted sources are conflicting, then guidance as to the intended scope of the order may be sought by application of the *Diversified Products* criteria. *See Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990); *Wirth Ltd. v. United States*, 5 F. Supp. 2d 968, 975–78 (Ct. Int'l Trade 1998); *Koyo Seiko Co., Ltd. v. United States*, 834 F. Supp. 1401, 1404 (Ct. Int'l Trade 1993), *aff'd*, 31 F.3d 1177 (Fed. Cir. 1994). Accordingly, the Court holds Commerce properly resorted to application of the *Diversified Products* criteria in determining whether Reiner Brach profile slab is merchandise of the same class or kind as cut-to-length carbon steel plate.

B. *Whether Commerce's Diversified Products Analysis is Supported by Substantial Evidence*

The applicable regulation provides that when the petition, initial investigations, and determinations of Commerce (including prior scope determinations) and the ITC do not resolve definitively whether the product in question is within the scope of an antidumping or countervailing duty order, Commerce shall continue its analysis by applying the *Diversified Products* criteria. These criteria include "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2) (1998). The purpose of an analysis under section 351.225(k)(2) is to "determine whether a product is sufficiently similar as merchandise unambiguously within the scope of an order as to conclude the two are merchandise of the same class or kind." *Wirth*, 5 F. Supp. 2d at 981; *see also Eckstrom Indus., Inc. v. United States*, 70 F. Supp. 2d 1360, 1364 (Ct. Int'l Trade 1999). In conducting this analysis,

"it is well settled that Commerce has discretion in how to balance the *Diversified Products* criteria." *Koyo Seiko Co., Ltd. v. United States*, 955 F. Supp. 1532, 1547 (Ct. Int'l Trade 1997); *Smith Corona Corp. v. United States*, 698 F. Supp. 240, 253 (Ct. Int'l Trade 1988).

Plaintiff asserts Commerce's *Diversified Products* analysis is not supported by substantial evidence on the record. Defendant and Defendant-Intervenors contend the Court should reject Plaintiff's assertions and find Commerce's conclusions, based on its application of the *Diversified Products* criteria, to be supported by substantial evidence on the record.

1. *Physical Characteristics*

In its *Final Scope Determination* the Department of Commerce concluded the physical characteristics of Reiner Brach profile slab are substantially similar to those of heavy plate. *Final Scope Determination* at 3. Commerce discusses six factors supporting this conclusion. First, Commerce notes Reiner Brach profile slab shares common dimensional characteristics with the subject merchandise. *Id.* at 7. Second, Commerce notes Reiner Brach profile slab shares common chemical characteristics with the subject merchandise. *Id.* Third, Commerce explains Reiner Brach guarantees "[f]latness within close tolerances" and "according to international standards, with excellent surface." *Id.* at 7–8. Reiner Brach's Sales Brochure also states that thickness and width tolerances are according to requirement. *Id.* Fourth, Commerce notes that Reiner Brach profile slab meets thickness and flatness tolerances typical of plate. A survey provided by Plaintiff demonstrates that eight out of ten tested profile slabs did meet ASTM A6 tolerances, a specification for carbon steel plate. *Id.* at 7. Fifth, Commerce stated that "Novosteel's claim that the Reiner Brach profile slabs are not dimensionally uniform is irrelevant to the present analysis, as dimensional uniformity is not a requirement for classification as plate." *Preliminary Scope Determination* at 7, *aff'd, Final Scope Determination* at 7. Finally, Commerce explained that record evidence indicated Reiner Brach's profile slabs are finished, rather than semi-finished, products because: (1) Plaintiff noted in its questionnaire response that Reiner Brach profile slabs may be rolled from slab itself; (2) Reiner Brach Sales Brochure states that "ultrasonic testing is performed manually on each finished slab to provide our customers with internal integrity assurance" and "[a]ll pieces are cut back to sound, clean steel," demonstrating Reiner Brach performs a variety of quality- and finish-enhancing operations that suggest its profile slabs are sold as finished products; and (3) the Reiner Brach Sales Brochure indicates that "a hydraulic press as well as a five-roll flattening machine are employed." *Preliminary Scope Determination* at 6, *aff'd, Final Scope Determination* at 7.

Plaintiff challenges the *Final Scope Determination's* conclusions, contending Reiner Brach profile slab is not a finished product because it does not share the same physical characteristics as carbon steel

plate. First, Plaintiff reiterates its argument that Reiner Brach profile slab is not a finished, flat-rolled product because it has not been "further worked" in accordance with any of the production processes outlined by *Wirth's Final Scope Ruling* or *Wirth*. The Court need not engage in an extended analysis to reject Plaintiff's argument with respect to this issue. The Court made it clear, *supra* DISCUSSION at Section A, that it would not limit the scope of the *Plate Orders* by creating a finite set of production processes capable of manufacturing flat-rolled plate products.

Second, Plaintiff contends "Reiner Brach's mention of a flattening machine in their flyer is not evidence that a flattening machine was utilized in the production of Reiner Brach slab." (Pl.'s Br. at 26.) Plaintiff claims blueprints of the Reiner Brach facility do not incorporate a five-roll flattening machine. (*Id.; Facility Blueprints, reproduced* at Pl.'s App. Tab 3, Ex. 6.) Plaintiff asserts Commerce's conclusion that Reiner Brach actually uses a flattening machine in the production of the subject merchandise is "'unsubstantiated and contradicted', not supported by any evidence and not in accordance with law." (Pl.'s Br. at 26.) The Court has already declined to re-weigh the record evidence and found that the Sales Brochure is relevant evidence that Commerce is entitled to rely upon. *See supra*, DISCUSSION at Section A.

Third, Plaintiff argues Commerce erred in relying on Reiner Brach's use of ultrasonic testing of the profile slab as evidence of a conditioning or finish-enhancing process that would result in the creation of a finished product. (*Id.* at 27.) Plaintiff maintains ultrasonic testing neither enhances the physical characteristics nor the performance of the profile slab. Rather, Plaintiff urges, the testing merely identifies large air pockets which are detrimental to the internal integrity of the slab. (*Id.*) As Commerce stated in its *Final Scope Determination*, it did not "cite Reiner Brach's use of ultrasonic testing to prove that Reiner Brach is producing plate rather than slab." Commerce's reference to the testing was to "demonstrate that the company performs a variety of quality-and finish-enhancing operations that suggest its profile slabs are sold as finished products." *Final Scope Determination* at 7. The Court finds Commerce was justified in using the ultrasonic testing as further evidence that Reiner Brach's profile slabs share similar physical characteristics with plate.

The Court finds Commerce's determination that Reiner Brach profile slab and merchandise unambiguously within the scope of the *Plate Orders* share similar physical characteristics is supported by substantial evidence on the record and is otherwise in accordance with law.

2. *Ultimate Use*

Commerce's *Final Scope Determination* also concluded Reiner Brach profile slab has ultimate uses similar to merchandise unambiguously within the scope of the *Plate Orders*. Commerce found "that some of the end uses for Reiner Brach profile slabs overlap with uses for other products covered by the scope of the AD and CVD orders." *Final Scope*

*Determination* at 8. Commerce observed that "while products may have a physical characteristic which distinguishes them from other cold-rolled and hot-rolled flat products, this difference does not necessarily rise to a level of a class or kind distinction." *Preliminary Scope Determination* at 7. Commerce cited three factors leading to this conclusion. First, two common plate specifications – A6 and A36 – do not require mechanical certification. Reiner Brach profile slab fits within these two categories. *Final Scope Determination* at 8. Second, Commerce found that "Novosteel appears to concede that, with respect to certain 'primitive' applications, profile slab could substitute for plate." *Id.* Third, Commerce found it relevant that the Reiner Brach Sales Brochure states the company was founded "to augment the shrinking supply of very expensive thick plate on the world steel market." *Id.*

Plaintiff contends Commerce's analysis is "inherently flawed" because Commerce never provides evidence to support its "claim that slab is ever substitutable for plate in mechanical and structural applications." (Pl.'s Br. at 29.) Plaintiff argues "there is a distinct class of application for which slab is not suitable for use, namely engineering uses, bridges, etc." (*Id.*) Plaintiff also argues that Commerce failed to consider the affidavits of Novosteel's U.S. end-users that indicate slab cannot be used in any type of structural application, nor is it purchased for use in such applications. (*Id.*) Third, Plaintiff asserts it has never conceded that profile slab could substitute for plate. (Id. at 30.) Fourth, Plaintiff contends that, in Wirth, the Court held that "steel plate and slab are not interchangeable." (*Id.*) Finally, Plaintiff contends "Barzelex's U.S. customers buy Reiner Brach slab with the expectation of use in primitive applications." (*Id.* at 31.)

The Court rejects Plaintiff's arguments. Commerce clearly stated in its *Final Scope Determination* that it "did not find that Reiner Brach profile slab may be substituted for plate in mechanical and structural applications; rather, [it] found simply that 'several of the ultimate uses {for profile slabs} are the same as those for other products within the scope of the . . . orders.'" *Final Scope Determination* at 8. As Commerce indicated, Reiner Brach profile slab does have the potential for substitution in A6 and A36 applications, those that do not require mechanical certification. *See id.* at 8; *Lukens 1996 Plate Steel Specification Guide, reproduced* at Pl.'s App. Tab 6, Ex. 3, at 28. Plaintiff's argument with respect to the Court's holding in *Wirth* that steel plate and slab are not interchangeable is inaccurate. The Court held that the two products need not be an identical replacement for one another to have similar ultimate uses. *See Wirth*, 5 F. Supp. 2d at 980. The ultimate use criterion does not require a complete overlap of uses to be supported by substantial evidence. Plaintiff urges this Court to accept declarations by U.S. customers that they "do not recommend that end users substitute Reiner Brach slab for plate applications." (Pl.'s Br. at 31.) As Defendant aptly notes, the issue is whether Reiner Brach's profile slabs could substitute for cut-to-length carbon steel plate in certain applications. (Def.'s Br. at 35.) There is no require-

ment that Commerce find actual substitutability for all applications.

Additionally, Plaintiff has in fact conceded that profile slab could substitute for plate in "primitive applications where mechanical guarantees are not necessary." *Novosteel Questionnaire Response, reproduced* at Pl.'s App. Tab 9, at 5 (Reiner Brach profile slab "is limited to primitive applications."); *Id.* at 19 ("Carbon steel plate may theoretically be substituted for Reiner Brach slab profile . . . ."). Reiner Brach profile slab has been used in making platens, counterweights, molds, and machinery components after having been cut into shape by an oxy-acetylene torch. *See Novosteel Scope Inquiry, reproduced* at Pl.'s App. Tab 1, at 24. These are all typical applications for heavy plate. Finally, Plaintiff's argument that it never told its U.S. customers that Reiner Brach profile slab may be used in place of plate is directly contradicted by the Reiner Brach Sales Brochure. The Sales Brochure plainly states Reiner Brach profile slab was produced to "augment the shrinking supply of very expensive thick plate on the world steel market." *Reiner Brach Sales Brochure, reproduced* at Pl.'s App. Tab 4, Att. B, at 1. Plaintiff also concedes it handed the Sales Brochure out to its U.S. customers. *See Novosteel Questionnaire Response, reproduced* at Pl.'s App. Tab 9, at 27. The Court finds Commerce's determination that some of the end uses for Reiner Brach profile slabs overlap with uses for other products covered by the scope of the *Plate Orders* is supported by substantial evidence on the record and is otherwise in accordance with law.

3. *Expectations of the Ultimate Purchasers*

Commerce concluded that the expectations of the ultimate purchasers of Reiner Brach profile slab are similar to those of the ultimate purchasers of cut-to-length carbon steel plate. *Final Scope Determination* at 9. Commerce cited three factors as the basis for this determination. First, the physical characteristics of both products are similar. *Id.* Second, many of the ultimate uses of the two products are the same. *Preliminary Scope Determination* at 8, *aff'd, Final Scope Determination* at 9. Third, Reiner Brach's Sales Brochure "strongly suggests that uses, and therefore customer expectations, are similar for profile slabs and thick plate." *Preliminary Scope Determination* at 8, *aff'd, Final Scope Determination* at 9. (Citing Reiner Brach's assurances of "superior internal integrity . . . flatness within close tolerances . . . thickness and width tolerance according to requirements . . . {and} suppl{ied} to chemistry."). Commerce also rebutted Plaintiff's assertion that because certain U.S. customers only made one trial purchase of Reiner Brach profile slab or declined a trial purchase altogether, their expectations are not comparable. Commerce concluded the "very fact that some of these customers (who, according to Novosteel, only stock hot-rolled plate) made trial purchases could be viewed as an indication that they do view profile slabs as an alternative to thick plate." *Final Scope Determination* at 9.

Plaintiff contends Commerce has not offered any evidence that the

expectations of slab purchasers are the same as those of a purchaser of plate. First, Plaintiff asserts that the physical characteristics and ultimate uses of Reiner Brach profile slab are not the same as those of finished plate products. (Pl.'s Br. at 33.) Second, Plaintiff maintains the Reiner Brach Sales Brochure is not credible evidence upon which Commerce may rely. (*Id.* at 31–32.) Third, Plaintiff argues Commerce has offered no evidence supporting its conclusion that "'the fact that some U.S. companies made trial purchases of slab could be viewed as an indication that they view profile slabs as an alternative to thick plate.'" (Pl.'s Br. at 32, *quoting Final Scope Determination* at 9.) Plaintiff asserts the U.S. companies' failure to stock Reiner Brach profile slab after solicitation is compelling evidence that these companies do not view profile slab as an alternative to thick plate. (Pl.'s Br. at 32.)

The Court finds Plaintiff's arguments unpersuasive. Since the Court has already determined that there is substantial evidence supporting Commerce's conclusions that the physical characteristics and ultimate uses for Reiner Brach profile slab are similar to carbon steel plate, Plaintiff's first argument is without merit. *See supra*, DISCUSSION at Section B, parts 1& 2 (Physical Characteristics and Ultimate Use). Similarly, the Court rejects Plaintiff's claim that the Reiner Brach Sales Brochure is not credible evidence upon which Commerce may rely for the reasons stated *supra*, DISCUSSION at Section A. Finally, the Court will not accept Plaintiff's invitation to re-weigh the evidence regarding the interpretation of the U.S. companies' failure to become customers of Reiner Brach profile slab. Commerce is entitled to accord that weight it feels is due the evidence. *See Wirth*, 5 F. Supp. 2d at 979–80; *Shieldalloy Metallurgical Corp. v. United States*, 975 F. Supp. 361, 364 (Ct. Int'l Trade 1997). The Court finds that Commerce's determination that the expectations of ultimate purchasers of Reiner Brach profile slab are similar to those of the ultimate purchasers of cut-to-length carbon steel plate covered by the *Plate Orders* is supported by substantial evidence on the record and is otherwise in accordance with law.

4. *Channels of Trade*

The Department of Commerce concluded in its *Final Scope Determination* that there is an overlap in the channels of trade for Reiner Brach profile slab and the cut-to-length carbon steel plate subject to the *Plate Orders*. *Final Scope Determination* at 9. Commerce based this determination on three factors. First, Commerce found Plaintiff sells both plate and profile slab. *Id.* Second, Plaintiff submitted evidence indicating it attempted to sell profile slabs to some of its existing customers for cut-to-length plate. *Id.* Third, the Reiner Brach Sales Brochure states its "profile slabs are intended for the thick plate market." *Id.*

Plaintiff contends "any determination of the [Department of Commerce] that the channels of trade are the same for Reiner Brach profile slab and hot-rolled plate are based upon false assumptions by

the [Department of Commerce] and must be overturned." (Pl.'s Br. at 35.) Plaintiff insists, contrary to Commerce's findings, that it does not buy hot-rolled plate from any German producer. Plaintiff also maintains it has never offered or sold hot-rolled plate in the United States. (*Id.* at 34.) Finally, Plaintiff asserts the customers it solicited for prospective purchases of profile slab were not existing customers of cut-to-length plate, because it had never before offered or sold hot-rolled plate in the United States. (*Id.*)

The Court again finds Plaintiff's arguments unpersuasive. Commerce's conclusion that Plaintiff sells both slab and plate is based upon record evidence supplied by the parties during the scope proceeding. Defendant-Intervenors submitted a document indicating that on November 9, 1995, Novo-Plez S.A. changed its name to Novosteel S.A. *See* Pl.'s App. Tab 4, Att. C. Defendant-Intervenors also submitted an excerpt from *Steel Traders of the World* stating that Novo-Plez S.A. dealt with the following steel products:

> re-rolling ingots, *slabs*, blooms, billets, hot rolled band (for re-rolling), wire rod, merchant bars, reinforcing bars . . . *medium plates, heavy plates*, hot rolled uncoated sheet/coil . . . .

*Steel Traders of the World* 286, reproduced at Pl.'s App. Tab 4, Att. C (emphasis added).[9] Plaintiff did not challenge Defendant-Intervenors' reliance upon this information, and in fact confirmed Defendant-Intervenors' assertions in its October 26, 1998 submission in which Plaintiff states its "activities are identified in detail at page 319, *Steel Traders of the World*, 7th ed. 1997." *Novosteel's Scope Inquiry Supplemental Information, reproduced* at Pl.'s App. Tab 3, at 22. The referenced page confirms Novosteel handles the same steel products as its predecessor, Novo-Plez, S.A. *See Steel Traders of the World* 319 (7th ed. 1997), *reproduced* at Def.'s App. Tab 3. Furthermore, Plaintiff admitted "that following publication of the Reiner Brach flyer in 1994," its exclusive importer, "Barzelex, Inc., solicited U.S. buyers and processors of hot rolled plate as potential customers of their slab products." *Novosteel's Rebuttal to Dewey Ballantine's October 26, 1998 Comments, reproduced* at Pl.'s App. Tab 6, at 9. Finally, the Court notes the Reiner Brach Sales Brochure does indicate that Reiner Brach profile slab is intended to "augment the shrinking supply of very expensive thick plate on the world market." *Reiner Brach Sales Brochure, reproduced* at Pl.'s App. Tab 4, Att. B, at 1. The Court finds Commerce's determination that Reiner Brach profile slab and merchandise within the scope of the *Plate Orders* are sold within the same channels of trade is supported by substantial evidence on the record and is otherwise in accordance with law.

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[9] The Court notes the edition and year for this publication are not marked on the excerpt provided by Plaintiff.

5. *Manner of Advertising and Display*

Commerce concluded "that the manner in which the Reiner Brach profile slabs are principally advertised (the Reiner Brach sales brochure) is consistent with the manner in which the cut-to-length plate covered by these orders is also advertised." *Preliminary Scope Determination* at 9, *aff'd, Final Scope Determination* at 10. Commerce based its determination on the Reiner Brach Sales Brochure which explicitly states that "Reiner Brach . . . was established more than 25 years ago by Mr. Reiner Brach who foresaw the need for reasonable cost high quality hot rolled profiling slabs to augment the shrinking supply of very expensive thick plate on the world steel market." *Preliminary Scope Determination* at 9. Commerce concluded this "is strongly indicative that [Reiner Brach's] profile slabs are advertised and displayed in the same manner as cut-to-length carbon steel plate that is subject to the orders." *Final Scope Determination* at 10. Furthermore, Commerce explained that Plaintiff's assertions rested upon the "false notion that plate and slab are mutually exclusive product categories." *Id.* Given the overlap between the two products, Commerce explained "it is certainly not illogical for Reiner Brach to sell profile slabs to customers who, for example, do not require plate certified for mechanical or structural applications." *Id.*

Plaintiff raises two arguments in rebuttal of Commerce's determination. First, Plaintiff asserts "[n]either Reiner Brach, Novosteel, nor Barzelex advertise or promote the Reiner Brach product." Specifically, "[i]nformation about the Reiner Brach product is never distributed by advertisement or solicitation," and it is "never 'displayed', no trade shows or fairs have ever been visited or used in the North American Market." (Pl.'s Br. at 35.) Second, Plaintiff argues the Reiner Brach Sales Brochure cannot be compared with the detailed catalogues used by plate producers to advertise their products. For example, Plaintiff claims "Petitioner, Bethlehem Steel, advertises their product in a 90-page catalogue." Plaintiff also notes the descriptions in those catalogues are much more detailed, containing "in-depth chemical composition listings, as well as treatments requirements, delivery requirements, thickness and strength specifications, dimensions and composite price tables." (*Id.* at 35–36.)

The Court rejects Plaintiff's arguments. First, Plaintiff's own submissions indicate that it test-marketed Reiner Brach profile slab and used the Sales Brochure in the United States. *See Novosteel Questionnaire Response, reproduced* at Pl.'s App. Tab 9, at 15, 20, 28. Second, the steel companies Plaintiff refers to are large steel companies that produce a wide variety of plate products used for a wide variety of purposes, whereas Reiner Brach is admittedly a fairly small company manufacturing a limited number of products. Therefore, it would naturally follow that the larger companies would require larger and more detailed catalogues to highlight the differences between their products. The Court finds Commerce's determination that the manner in which Reiner Brach profile slab is advertised and displayed is

similar to that of cut-to-length carbon steel plate is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

For the reasons stated above, the Court finds Commerce's *Final Scope Determination* is supported by substantial evidence on the record and is otherwise in accordance with law. Plaintiff's motion for judgment upon the agency record is denied.

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**[PUBLIC VERSION]**

(Slip Op. 01–3)

ALLIED TUBE AND CONDUIT CORP., PLAINTIFF *v.* THE UNITED STATES, DEFENDANT, AND SAHA THAI STEEL PIPE CO., LTD., ET AL., DEFENDANT-INTERVENORS

Court No. 99–11–00715

[ITA's antidumping determination affirmed in part and remanded in part.]

(Dated January 18, 2001)

*Schagrin Associates* (*Roger B. Schagrin*) for plaintiff.

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*O'Melveny & Myers LLP* (*Peggy A. Clarke* and *Greyson Bryan*) for defendant-intervenors Saha Thai Steel Pipe Co., Ltd., Ferro Union, Inc., and Asoma Corporation.

OPINION

RESTANI, *Judge*: This matter is before the court on a motion for judgment on the agency record pursuant to USCIT Rule 56.2, brought by Allied Tube and Conduit Corp. ("Allied Tube" or "plaintiff"), the petitioner in the underlying antidumping administrative review. Defendant-intervenors Saha Thai Steel Pipe Co., Ltd. ("Saha Thai" or "respondent"), Ferro Union, Inc., and Asoma Corporation (collectively "defendant-intervenors") appear in order to support the determination of the United States Department of Commerce ("Commerce" or the "Department") in the underlying administrative proceeding. At issue is *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 64 Fed. Reg. 56,759 (Dep't Comm. 1999) (final determ.) [hereinafter "*Final Results*"].

Allied Tube challenges two of the Department's conclusions from the *Final Results*: (1) that the date of sale on which normal value is to be determined for Saha Thai's sales is the invoice date, and (2) that

Saha Thai is entitled to a duty drawback adjustment to its export price, at an amount quantified based on the Department's selection of facts available. Commerce and defendant-intervenors urge this court to deny plaintiff's motion based on the following: (1) plaintiff's challenge to the identification of invoice date as the date of sale cannot overcome the agency's regulatory presumption in favor of invoice date, and (2) Saha Thai satisfied the Department's two-prong test for entitlement to duty drawback, notwithstanding certain of Saha Thai's inaccuracies, which were addressed in any event by Commerce's use of facts otherwise available.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). In reviewing final determinations in antidumping duty investigations, this court will hold unlawful those determinations of Commerce found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994).

DISCUSSION

I. *Date of Sale*

A. *Facts*

In response to the Department's initial questionnaire regarding the date of sale for Saha Thai's U.S. sales, respondent submitted to Commerce a representative group of sales documents. *See Supplement to Section A Questionnaire Response* (July 1, 1998), at Exh. 12, C.R. Doc. 3, Saha Thai App., Tab A. Saha Thai reported invoice date as the date of sale. *See Section C Questionnaire Response* (Aug. 3, 1998), at C–16 to 17, C.R. Doc. 7, Saha Thai App., Tab B, at C–16 to 17. Responding to an additional request for information regarding date of sale, Saha Thai reported that for sales to the company's principal U.S. customer, which accounted for two-thirds of U.S. sales,

> the contract notes only the total quantity to be ordered. The specific quantity for each product is set subsequently. The exact quantity for each sale is not determined until the merchandise is shipped.

*Supplemental Questionnaire Response* (Sept. 23, 1998), at 13, C.R. Doc. 14, Def.'s App., Exh. 2, at 2.

The Department conducted a verification of Saha Thai's questionnaire responses during the week of January 25, 1999. *See Verification Report* (Feb. 25, 1999), at 1, C.R. Doc. 22, Saha Thai App., Tab E, at 1. Commerce confirmed during verification that Saha Thai's business records identified invoice date as the date of sale. *See id.* at 13, Saha Thai App., Tab E, at 13. Respondent also produced exhibits, reviewed by the Department, that included contracts, invoices and purchase orders for certain U.S. sales. *See* Verification Exhs. 21, 22, 23, in Pl.'s

App., at 74–108, 109–123, 124–135, respectively. In response to Department questions about the export sales process, Saha Thai's export manager noted that the sales contracts establish quantities, but that customers submit purchase orders that indicate specific quantities to be supplied for each product and shipment. *See Verification Report*, at 20, Saha Thai App., Tab E, at 20. The sales contracts allow for deviations from the specified quantity of up to X %,[1] measured against the total quantity of goods in a purchase order (covering subject and non-subject merchandise), not against the quantity for individual products or shipments. *See id.* at 20, Saha Thai App., Tab E, at 20.

Based on its evaluation of Saha Thai's sales documentation, viewed in the context of the specific terms of respondent's sales contracts, the Department concluded that changes in material terms of sale, particularly quantity, occurred between purchase order date and invoice date. *See Final Results*, 64 Fed. Reg. at 56,768.

B. *Analysis*

The Department's date of sale determination is governed by 19 C.F.R. § 351.401(i) (2000).[2] Section 351.401(i) provides that Commerce will "normally" use the invoice date as the date of sale. A party seeking to have the invoice date deemed the date of sale is entitled to this regulatory presumption only if that party records the invoice date as the date of sale in the company's "records kept in the ordinary course of business." *Id.* Once a party's records reveal that it identifies the invoice date as the date of sale, the party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to "satisf[y]" the Department that "a different date better reflects the date on which the exporter or producer establishes the material terms of sale." *Id.*

As elaborated by Department practice, a date other than invoice date "better reflects" the date when "material terms of sale" are established if the party shows that the "material terms of sale" undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date. *See, e.g., Issues & Decision Mem.* to *Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico*, 65 Fed. Reg. 39,358 (Dep't Comm. June 2000) (final determ.), at cmt. 2 [hereinafter "*Issues Mem. to Pipe from Mexico*"]; *Issues & Decision Mem.* to *Circular Welded Non-Alloy Steel Pipe from Mexico*, 65 Fed. Reg. 37,518 (Dep't Comm. June 2000) (final determ.), at Hylsa cmt. 1. Whatever else may constitute "material terms of sale," agency practice makes clear that price and quantity, at least, are such "material terms." *See, e.g.,*

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[1] "X" represents the [ ]% tolerance figure specified in the sales contracts.

[2] Allied Tube also challenges the Department's date of sale regulation as *ultra vires* because it is inconsistent with the antidumping statute and the Statement of Administrative Action, accompanying H.R.Rep. No. 103–826(I), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("SAA"). This argument has been considered and rejected by this court in *Allied Tube and Conduit Corp. v. United States*, No. 98–11–03135, Slip Op. 00–160, at 19–23 (Ct. Int'l Trade Dec. 12, 2000).

*Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 64 Fed. Reg. 30,664, 30,679 (Dep't Comm. 1999) (final determ.); *Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 Fed. Reg. 30,592, 30,609 (Dep't Comm. 1999) (final determ.). Therefore, if there is a change in price and/or quantity after the proposed date, and the Department fails to provide a rational explanation as to why such a change is not meaningful for date of sale analysis, then Commerce is bound under the regulation to employ invoice date as the date of sale. *See Thai Pineapple Canning Indus. Corp., Ltd. v. United States*, No. 98–03–00487, 2000 WL 174986, at *2 (Ct. Int'l Trade 2000).

Plaintiff in this case failed to cite sufficient evidence to compel a rejection of the regulatory presumption in favor of invoice date as the date of sale. Respondent Saha Thai's internal business records, as verified by the Department, identified the date of sale to be the invoice date. *See Verification Report*, at 13, Saha Thai App. Tab E, at 13. The presumption in favor of the invoice date was further strengthened by the changes in quantity observed by the Department between the purchase order date and the invoice or shipment date.[3] *See Date of Sale Memo* (Aug. 11, 1999), at 3–4, C.R. Doc. 34, Pl.'s App., at 54–55.

Plaintiff emphasizes previous agency determinations suggesting that the date of sale may be other than the invoice date, notwithstanding changes in quantity, based on the fact that such quantity changes fell within tolerance limits specified in the relevant sales contracts. *See Issues Mem. to Pipe from Mexico*, at cmt. 2; *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,588 (Dep't Comm. 1998) (final determ.). These findings do not dictate a similar result here, however, because plaintiff has not cited evidence establishing that the quantity changes between the purchase order date and the invoice date in this case were within the sales contracts' tolerance limits. Calculating Saha Thai's shipments of individual products (*i.e.*, subject merchandise) to be within X % of the amount specified in the sales contracts and purchase orders,[4] plaintiff argues that the changes in quantity relied upon by the Department are within the tolerance limits permitted by the contracts and therefore should not be considered meaningful changes for purposes of the agency's date of sale determination. The sales contracts, however, permitted shipments within X % of the contractually-specified quantity, measured in terms of all products in a purchase order (including subject and non-subject merchandise), not in terms of quantity per shipment of individual products.[5] *See* Verification Report, at 20, Saha Thai App., Tab E, at 20. Because plaintiff failed to establish that the quantities

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[3] Plaintiff challenges the Department's reliance on changes in quantity as calculated from incompiete documentation provided in Verification Exhibit 23, in particular, the absence of a complete purchase order. *See* Verification Exh. 23, in Pl.'s App., at 124–135. The type of documentation required varies from investigation to investigation. Whether judged in hindsight a different investigation would have been more enlightening, here plaintiff has failed to establish that Commerce did not perform its core investigatory duties adequately. *See infra* discussion in text.

[4] *See supra* n.1.

[5] Although the contracts covered subject and non-subject merchandise, none of the parties has established that the malleability of the contractual situation turned on the type of merchandise covered.

shipped by respondent were within the tolerance limits, when viewed against the *aggregate quantity per purchase order*, plaintiff did not "satisf[y]" the Department that a date other than invoice date "better reflect[ed]" the date of sale.

By placing on plaintiff the burden to cite to evidence comparing the changes in quantity against the aggregate quantity per purchase order, the court essentially may be requiring plaintiff in this case to ensure that a complete set of invoices for each sales contract is in the record. Such evidence, understandably, is uniquely within the control of respondent. The court recognizes that, in this case, plaintiff therefore could not have placed the requisite evidence on record by its own submissions. Nevertheless, plaintiff could have taken the steps necessary to ensure the placement of such evidence on the record, for example, by requesting the Department to obtain the documentation from the respondents.

Even though the Department and plaintiff were unaware until verification that the tolerance limits were measured against the total quantity on a purchase order, the Department is capable of seeking additional information from respondents through requests made during verification or supplemental questionnaires issued after verification. *See, e.g., Dynamic Random Access Memory Semiconductors of One Megabit and Above ("DRAMs") from Taiwan*, 64 Fed. Reg. 56,308, 56,310 (Dep't Comm. 1999) (final determ.) (two supplemental questionnaires issued after sales verification); *Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea*, 64 Fed. Reg. 15,444, 15,450 (Dep't Comm. 1999) (final determ.) ("During the course of verification, it is normal for the Department to request additional information or documentation from a respondent."); *Sulfanilic Acid from the People's Republic of China*, 63 Fed. Reg. 63,834, 63,836 (Dep't Comm. 1998) (final determ.) (supplemental questionnaire issued after verification). Plaintiff could have made the request for the desired information in post-verification comments.[6] Plaintiff does not claim that it made such a request of the Department, and the court has found no evidence of such a request in its review of the record. Although the investigatory nature of the proceeding places the burden of the core of the investigation on Commerce, the parties do guide the process and must alert the agency to matters which they believe require unusually detailed inquiry.

In any event, even if plaintiff were correct that quantity changes under the sales contracts at issue should be evaluated based on shipments of individual products, rather than on the aggregate quantity of products per purchase order, invoice date would remain the proper date of sale. A comparison of a purchase order and corresponding invoice from Verification Exhibit 21 revealed a percentage change in quantity far in excess of the contractually-specified tolerance limit.[7]

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[6] In fact, plaintiff in this case did submit such post-verification comments on Saha Thai's verification responses "in anticipation of the Department's preliminary results," but plaintiff's comments did not include a request for additional invoices. Petitioners' Post-Verification Comments On Saha Thai, at 1, C.R. Doc. 23.

[7] The Department identified a quantity change of [ ]%, whereas, as discussed above, the contract permitted a variance of only [ ]% from the quantities ordered. *See* Date of Sale Memo, at 3, Pl.'s App., at 54.

*See Date of Sale Memo*, at 3, C.R. Doc. 34, Pl.'s App., at 54. Given the regulatory presumption favoring the use of invoice date, the existence of this one sale beyond contractual tolerance levels suggests sufficient possibility of changes in material terms of sale so as to render Commerce's date of sale determination supported by substantial evidence.

Accordingly, the court finds that the agency was entitled to apply its regulation and allow date of invoice to constitute date of sale.

II. *Duty Drawback*

A. *Facts*

Saha Thai claimed a duty drawback adjustment to export price in its initial and supplemental questionnaire responses, identifying its participation in a cash-based and a guarantee-based duty drawback program in Thailand. *See Section C Questionnaire Response*, at C–33, Saha Thai App., Tab B, at C–33; *Supplemental Questionnaire Response* (Sept. 23, 1998), at 27–28, Saha Thai App., Tab C, at 27–28. Respondent calculated the drawback adjustment to which it claimed it was entitled by dividing the total amount of drawback received for each invoice by the number of tons exported. *See Section C Questionnaire Response*, at C–33, Saha Thai App., Tab B, at C–33; *Supplemental Questionnaire Response* (Sept. 23, 1998), at 28, Saha Thai App., Tab C, at 28. Supporting documentation submitted with the original and supplemental questionnaire responses, including import reports and export reports, identified the quantities of inputs imported, duties paid thereon or exempted therefrom, quantities of subject merchandise subsequently exported, and total drawback amounts granted by the Thai Government. *See Section C Questionnaire Response*, at Exh. C–3, Saha Thai App., Tab B–3; *Supplemental Questionnaire Response* (Sept. 23, 1998), at Exh. SR2–23, Saha Thai App., Tab C–23.

At verification, reviewing import documentation related to Saha Thai's duty drawback claims, the Department identified certain discrepancies between amounts claimed for cash drawback and what was reported in the documentation presented. *See Verification Report*, at 15, Saha Thai App., Tab E, at 15. Commerce also asked respondent at verification to provide evidence of duties having been paid with regard to one particular purchase of imported inputs, but Saha Thai offered multiple, inconsistent responses during the course of verification. *See Duty Drawback Memo* (Aug. 11, 1999), at 2–3, C.R. Doc. 35, Def.'s App., Exh. 3, at 2–3.

In light of these difficulties at verification, Commerce denied the duty drawback adjustment in the preliminary results. *See Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 64 Fed. Reg. 17,998, 18,000 (Dep't Comm. 1999) (prelim. determ.). Before publication of the final determination, Commerce reviewed the additional documentation submitted by Saha Thai during verification and with respondent's case brief to the Department. After this review, and in

light of the agency's familiarity from previous reviews with respondent's duty drawback adjustments and the Thai duty drawback system in general, the Department granted Saha Thai's request for a duty drawback adjustment. *See Final Results*, 64 Fed. Reg. at 57,761–63. Because of the inconsistencies discovered during verification, however, Commerce did not accept the drawback amount calculated by Saha Thai; rather, the agency relied upon facts otherwise available in calculating the precise amount of the duty drawback adjustment. *See id.* The result of the Department's application of facts available granted Saha Thai a larger duty drawback adjustment than that derived from respondent's proffered (and rejected) data. *See* Def.'s Supp. Br. at 18.

B. *Analysis*

A respondent seeking a duty drawback adjustment may base its claim on a foreign government program that either provides respondent with a rebate for import duties, or grants to respondent an exemption from import duties, for imported merchandise that is subsequently exported. 19 U.S.C. § 1677a(c)(1)(B). In order to determine whether respondent is entitled to a duty drawback adjustment, Commerce has employed a two-prong test:

(1) Are the rebate and import duties dependent upon one another, or in the context of an exemption from import duties, is such an exemption linked to the exportation of the subject merchandise?
(2) Did respondent establish a sufficient amount of raw inputs imported to account for the level of duty drawback received for the exported product?

*See Carbon Steel Wire Rope from Mexico*, 63 Fed. Reg. 46,753, 46,756 (Dep't Comm. 1998) (final determ.); *Certain Welded Carbon Standard Steel Pipes and Tubes From India*, 62 Fed. Reg. 47,632, 47,635-36 (Dep't Comm. 1997) (final determ.). As with all favorable adjustments to normal value or export price, respondent bears the burden of establishing both prongs of the test, and therefore, its entitlement to a duty drawback adjustment. *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996) ("Commerce has reasonably placed the burden to establish entitlement to adjustments on [respondent], the party seeking the adjustment and the party with access to the necessary information."); *Primary Steel, Inc. v. United States*, 17 CIT 1080, 1090, 834 F. Supp. 1374, 1383 (1993) ("The burden of creating a record from which the ITA could determine whether [respondent] was entitled to a duty drawback adjustment rested with [respondent], not Commerce.").

1. *Entitlement to Duty Drawback*

Plaintiff initially contests the Department's grant of a duty drawback adjustment based on Saha Thai's reliance on a cash-based and a bank guarantee-based program of duty drawback. Plaintiff concedes

that the cash-based program satisfies the first prong of the Department's test. Plaintiff argues that the description of the guarantee-based program provided by Saha Thai in its original questionnaire responses, on the other hand, is insufficient to satisfy the requirements of the first prong, particularly as key supporting documentation was not supplied by respondent until after verification, in its case brief to the agency.

Contrary to plaintiff's suggestion, the Department is not precluded from accepting and considering respondent's post-verification submission of additional detailed information regarding the requirements for the duty drawback programs at issue. Plaintiff effectively seeks to transform respondent's obligation to "creat[e] an adequate record," *Tianjin Mach. Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992), into a limitation on the scope of the record. *Cf.* 19 U.S.C. § 1516a(b)(2)(A) (identifying record upon which judicial review is based as "a copy of all information presented to or obtained by [the Department] during the course of the administrative proceeding"). Saha Thai's submission permitted the agency and plaintiff sufficient opportunity to respond to and rebut the information provided, if possible. This opportunity is particularly available where, as here, the additional information provided is not of a complex or technical nature, but is simply a publicly-available statement of the Thai Government's duty drawback policy. *See* Thai Regulations Governing Drawback, Case Brief of Saha Thai (May 14, 1999), at Attch. 2, P.R. Doc. 89, Saha Thai App., Tab G–2. Such a statement issued by the foreign political organ responsible for the administration of that country's duty drawback program is sufficient, by itself, to sustain the Department's determination that the first prong of its duty drawback test had been satisfied. *See Huffy Corp. v. United States*, 10 CIT 214, 218–19, 632 F. Supp. 50, 54–55 (1986).

Plaintiff next contests the compliance of the cash-based and guarantee-based programs with the second prong of the Department's duty drawback test. Plaintiff claims that respondent provided insufficient evidence to substantiate the quantification of its duty adjustments. In Exhibit C–3, attached to Saha Thai's Section C Questionnaire Response, respondent provided an import report detailing the importation of certain inputs used in the manufacture of the subject merchandise at issue, particularly the amount of import duties paid. *See Section C Questionnaire Response*, at Exh. C–3, Saha Thai App., Tab B–3; *Supplemental Questionnaire Response* (Sept. 23, 1998), at Exh. SR2-23, Saha Thai App., Tab C–23.[8] The same exhibit included an export report that identified duty drawback amounts, labeled according to whether the drawback was in the form of a cash rebate (noted by a "C") or a guarantee (noted by a "G"). *See id.* The export report

[8] At the Department's request, plaintiff re-submitted with its September 23, 1998 Supplemental Questionnaire Response, a more legible copy of the documents that had been provided in Exhibit C–3 to the August 3, 1998 Section C Questionnaire Response. *See Supplemental Questionnaire Response* (Sept. 23, 1998), at 27, Saha Thai App., Tab C, at 27.

revealed a total amount in duty drawback equal to the amount of import duties specified in the import report. *See id.* Import and export reports provided by respondent as verification exhibits are similarly reconciled, establishing that the imported raw inputs give rise to sufficient import duties to equal the documented duty drawback amounts.[9] *See* Verification Exh. 9, in Pl.'s App., at 65, 69–70, 73. The cash- and guarantee-based drawback programs thus satisfy both prongs of the Department's duty drawback test and entitle Saha Thai to the corresponding adjustment in export price.

2. *Amount of Duty Drawback: Facts Available*

Notwithstanding the fact that both programs satisfied the Department's two-prong test, Commerce found insufficient data or inaccuracies in the record that mandated the application of facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(D). Regarding the bank guarantee drawback claim, Saha Thai failed to account for the fees the company must have paid to the bank in return for assuming the risk of guaranteeing Saha Thai's import duties. *See Duty Drawback Memo*, at 4, Def.'s App., Exh. 3, at 4. Facts available were employed in determining the appropriate adjustment under the cash-based program because certain statements and representations made by Saha Thai employees undercut the otherwise straightforward supporting documentation placed on the record by respondent. *See id.* at 2–4, Def.'s App., Exh. 3, at 2–4. Even if Saha Thai were entitled to a duty drawback adjustment, plaintiff argues, the Department erred because it applied facts otherwise available improperly when calculating the amount of adjustment for duty drawback.

Because of concerns as to the validity of the actual drawback amounts provided by Saha Thai, the Department calculated new drawback amounts using facts available. *See id.* at 4, Def.'s App., Exh. 3, at 4. The Department began with figures provided by Saha Thai that reflected duty drawback amounts per ton calculated for each of [ ] invoices (*i.e.*, those sales for which Saha Thai had claimed duty drawback). A simple average was then taken of these [ ] numbers to produce an average duty drawback per ton for the relevant sales. This average functioned as the modified drawback adjustment to export price, replacing the duty drawback amounts claimed by Saha Thai. *See id.* at 4 & Attachment, Def.'s App., Exh. 3, at 4 & Attachment.

The antidumping statute mandates that the Department rely on facts otherwise available where, *inter alia*, a party fails to provide the

[9] Plaintiff also argues that Saha Thai's occasional failure to meet the requirements of the cash-based program warrants a presumptive finding that Saha Thai similarly fails occasionally to meet the requirements of the guarantee-based program. In the absence of data from which the Department could conclude that Saha Thai always met its bank guarantee obligations, urges Plaintiff, respondent should be found to have failed to satisfy the second prong of the Department's duty drawback test. Plaintiff is correct to rely on this court's caselaw squarely placing on respondent the burden to establish entitlement to a favorable adjustment. Respondent has satisfied its initial burdens of production and persuasion here, however, in light of the above-cited evidence matching the duties paid on imports of inputs with the duty drawback amounts authorized by the Thai Government upon export of the subject merchandise. Given the evidence on record, therefore, the Department could reject the presumption proposed by plaintiff to evaluate the guarantee-based program.

agency with requested information in the time, manner, or form specified. 19 U.S.C. § 1677e(a)(2)(B). "The statutory directive that Commerce use [facts available] is intended to serve 'the basic purpose of the statute – determining current margins as accurately as possible.'" *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191, *reh'g en banc denied*, 1990 U.S. App. LEXIS 7144 (Fed. Cir. 1990)). Consistent with the antidumping statute's broader goal of accuracy in margin calculation, the Department's selection of facts available must also "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner . . . ." *Nat'l Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994) (citation omitted). In seeking the appropriate facts upon which the agency intends to rely, Commerce enjoys broad discretion, *see Mannesmannrohren-Werke AG v. United States*, 120 F. Supp.2d 1075, 1088–89 (Ct. Int'l Trade 2000) ["*Mannesmann II*"], which "is subject to a rational relationship between data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992).

Although the Department was permitted to conclude, on the basis of record evidence, that insufficient reliable data existed to calculate a duty drawback adjustment, the agency's solution failed to address the concerns raised by the possibly inaccurate record data. First, as acknowledged by Commerce, the average that became the modified drawback adjustment "did not specifically take into account whether the bank fees were included in the guarantee-based drawback adjustment claims made by Saha Thai." Def.'s Supp. Br. at 16. Second, it is unclear why the Department selected a simple average of the relevant shipments rather than a weighted average, which undoubtedly would have provided a more accurate representation of the drawback amounts per ton. Commerce is correct that its selection of facts available is not required to be the "best alternative information." SAA, at 869, *reprinted in* 1994 U.S.C.C.A.N. at 4198. Nevertheless, the agency must provide a reasoned explanation why it chooses a simple calculation methodology that on its face appears less probative than an alternative, equally-simple methodology.[10] *Cf. Nat'l Steel*, 870 F. Supp. at 1136 ("Commerce's actions may become unreasonable in nature if 'the agency . . . [has] . . . reject[ed] low margin information in favor of high margin information that was demonstrably less probative of current conditions.'" (quoting *Rhone Poulenc*, 899 F.2d at 1190)). Notwithstanding the court's request for supplemental briefing, the De-

[10] In this regard, the facts of this case stand in contrast to those present in *Mannesmann II*, where the court upheld the agency's facts available methodology. The Department in the underlying proceeding at issue in *Mannesmann II* applied facts available to calculate a more accurate figure for U.S. duties paid by respondent when respondent was shown to have underreported the requested data. *See* 120 F. Supp.2d at 1080–81. For shipments that had been verified, Commerce took a simple average of the differences between the respondent's (under)reported U.S. duties paid and what was found to have been the actual U.S. duties paid. *See id.* at 1088. That average was added to U.S. duties reported by respondent for sales not verified by the Department. *See id.* at 1081. Unlike the case here, however, the Department in *Mannesmann II* consciously decided not to use a weighted average and provided an explanation for its refusal to do so, and there does not seem to have been an issue as to the incentive prong of the facts available purpose. *See id.* at 1088 (citing Remand Determination at 18). *See infra* discussion in text.

partment has also failed to explain how its use of facts available mitigates the two possible problems raised by reliance on Saha Thai's information: (1) excessive drawback adjustment because the claimed drawback amounts may have improperly included the bank guarantee fees, and (2) drawback adjustment exceeding the actual amounts rebated (or exempted from import duties). In the absence of such an explanation, the Department has failed to establish a "rational relationship" between the adjustment data it calculated and the accurate duty drawback amounts that should be added to Saha Thai's export price. *Manifattura Emmepi*, 16 CIT at 624, 799 F. Supp. at 115. Finally, without rationally explaining how its selection of facts available will result in a more accurate duty drawback adjustment, the Department cannot fulfill its responsibility under the second prong of its duty drawback test to limit rebate adjustments to the actual amount of charges rebated (or exempted from import duties). *See Far East Mach. Co. v. United States*, 12 CIT 972, 974–75, 699 F. Supp. 309, 312 (1988); *Carlisle Tire & Rubber Co. v. United States*, 11 CIT 168, 172, 657 F. Supp. 1287, 1290 (1987).

The error in Commerce's selection of facts available is also evidenced by the more favorable outcome granted to Saha Thai as a result of the Department's facts available analysis than Saha Thai would have gotten had the Department accepted the company's proffered drawback amounts. According to the Department's own calculations, the agency's facts available methodology "increased the total amount of duty drawback claimed by Saha Thai by [ ]%." Def.'s Supp. Br. at 18. Such a beneficial outcome for a respondent, in light of its failure to provide sufficiently complete and reliable data upon the agency's request, controverts the incentives that are intended to be generated by the Department's reliance on facts available. *See Gourmet Equip. (Taiwan) Corp. v. United States*, No. 99–05–00262, 2000 WL 977369, at *2 (Ct. Int'l Trade 2000) ("The use of facts available provides the 'only incentive to foreign exporters and producers to respond to Commerce questionnaires' in antidumping and countervailing duty proceedings." (quoting SAA, at 868, *reprinted in* 1994 U.S.C.C.A.N. at 4198)). The Department's facts available analysis, therefore, is unsupported by substantial evidence on the record.

## Conclusion

Because plaintiff failed to cite to sufficient evidence to overcome the regulatory presumption favoring invoice date as the date of sale, the Department's date of sale determination is upheld. Commerce also properly recognized Saha Thai's entitlement to a duty drawback adjustment, but the Department's selection of facts available in calculating the amount of respondent's duty drawback adjustment is not supported by substantial record evidence. This matter is therefore remanded to Commerce to explain (1) why the Department's simple average calculation should be used instead of a weighted average calculation, (2) how the simple average calculation adequately addresses

the accuracy concerns raised by the data submitted by Saha Thai, and (3) how the simple average calculation serves the dual objectives of the facts available provision to promote accuracy in margin calculation and to provide respondents with incentive to report information completely, accurately, and in a timely manner. Alternatively, the Department may calculate on remand a new duty drawback adjustment using facts available, provided that its methodology also responds to the concerns raised by respondent's submitted data and is consistent with the objectives of the facts available provision.

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(Slip Op. 01–4)

JEWELPAK CORP., PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Court No.: 94–04–00230

(Decided January 24, 2001)

*Fitch, King and Caffentzis*, (*James Caffentzis, Peter J. Fitch*), for Plaintiff.

*Stuart E. Schiffer*, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Barbara S. Williams*); *Chi S. Choy*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WALLACH, *Judge*: Plaintiff, Jewelpak Corporation ("Jewelpak"), is an importer of various "presentation boxes" in which jewelry is shipped, stored, and sold. Plaintiff challenges the U.S. Customs Service's ("Customs") classification of its merchandise. Customs classified the subject merchandise under subheading 4202.92.90 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as "jewelry boxes." This subheading carried a duty rate of 20% *ad valorem*. Plaintiff contends that some of the boxes should be classified under subheading 3923.10.00, plastic boxes for the conveyance of goods, and the others under subheading 7310.29.00, iron or steel boxes.

A bench trial was held on June 26 and 27, 2000. Pursuant to USCIT R. 52(a), the court enters judgment for Defendant pursuant to the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This action involves the classification of merchandise. This merchandise was entered at the port of Los Angeles, CA, in July of 1993.
2. Each piece of subject merchandise has components including: (1) a plastic or metal shell; (2) a hinge; and, in some cases, (3) a

textile or plastic sheeting outer covering.

3. Customs classified the subject merchandise as "jewelry boxes" under HTSUS subheading 4202.92.90 (1993). Imports under this subheading carried a rate of 20% *ad valorem*.
4. In relevant part, HTSUS heading 4202, and subheading 4202.92.90 cover

> 4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
>
> * * *
>
> 4202.92 With outer surface of sheeting of plastic or of textiles material:
>
> * * *
>
> 4202.92.90 Other. . . . . .

5. Plaintiff claims that the subject merchandise is more properly classified under subheading 3923.10.00, plastic boxes for the conveyance of goods, and the others under subheading 7310.29.00, iron or steel boxes. In relevant part, heading 3923, subheading 3923.10.00 and heading 7310, subheading 7310.29.00 cover

> 3923 Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics:
>
> 3923.10.00 Boxes, cases, crates and similar articles.
>
> 7310 Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment:
>
> * * *
>
> Of a capacity of less than 50 liters:
>
> 7310.29.00 Other . . . . . .

6. Examination shows the subject merchandise to be flip open boxes consisting of a top and bottom shell which are connected by a

steel hinge. The boxes vary in size and shape, depending on the article of jewelry intended to placed within. The bottom shell serves as the base and the top shell serves as the flip open lid. The box shells are composed of either steel or plastic, and may possess an outer covering consisting of textile material or plastic sheeting.

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7. The court finds highly probative and credible the expert testimony of Peter C. Fuller, President of Fuller Box Co., which manufactures and markets boxes similar to Jewelpak's model M boxes, see Trial Transcript ("Tr.") at 211–12, that "[t]here is no way to make a quality box that would not be suitable for long-term use", *id.* at 335.

8. The subject jewelry boxes are designed to protect as well as package jewelry. The jewelry boxes are also capable of being used for storage. *Id.* at 66, 67 (testimony of James Porterfield).

9. The metal shells of the imported jewelry boxes are generally composed of 15 to 18 gauge steel. *Id.* at 230 (testimony of Peter C. Fuller that"[I]n a steel box, the minimum gauge used is fifteen, because that's what you need to make a box that will stand up to re-peated usage."); *see also id.* at 449–50 (testimony of Donald P. Wolfe).

10. The subject jewelry boxes employ hinges composed of more expensive and higher gauge steel, despite a cheaper 12 gauge steel hinge alternative, because the 12 gauge hinges were found to sustain no more than 50 box openings. *Id.* at 266, 298, (testimony of Peter C. Fuller); *see also id.* at 423 (testimony of John C. Kilmartin that 12 gauge steel hinges were inadequate); *see also id.* at 242 (testimony of Peter C. Fuller that "[The customers] would expect that the hinge would remain intact. And, therefore, we have to use a certain type of steel to do that.")

11. The court finds implausible and unpersuasive the testimony of James Porterfield that he had no knowledge about how many times the subject merchandise with an average hinge could be opened or closed, *see id.* at 91–92, in light of his February 3, 1999 deposition testimony that a typical injection molded box was capable of "a few hundred openings on average or more", and that metal shell boxes are "good for thousands" of openings, *see* Defendant's Exhibit L at 50, lines 9–19.

12. The fabric covering the Jewelpak model M100N box could be handled "thousands" of times. *Tr.* at 253 (testimony of Peter C. Fuller). The fabric covering the Jewelpak model F10N box could be handled "indefinitely". *Id.* at 253–54 (testimony of Peter C.

Fuller); see Plaintiff's Collective Exhibit 1–E, items M100N, F10N.

13. A mutual customer of Fuller Box and Jewelpak, Finley Fine Jewelry Corporation ("Finley"), declined to use boxes made with 12 gauge steel hinges, despite acknowledging the cost savings in the shipping and manufacture of such boxes. *Tr.* at 335 (testimony of Peter C. Fuller).

14. When designing its boxes for Finley, Fuller Box company was concerned not only with "cost reduction", but with making "a product that would stand up to use." *Id.* at 226 (testimony of Peter C. Fuller).

15. The court finds implausible the testimony of Matthew B. Burris, who oversaw Finley's jewelry box purchases before ultimately leaving the company in 1998, *see id.* at 114–21, that "[s]ubsequent re-use by a Finley customer was not something [Finley] considered when [Finley] purchased the boxes . . . . ", *id.* at 163, in light of his subsequent statement that the primary concern that Finley had in ordering boxes was "[q]uality of product, delivered, usable and at the best price," *id.* at 172.

16. The subject merchandise could be shipped to retail outlets with the retailer's name printed on the merchandise as a form of "free advertising," especially where the merchandise was expected to be reused by the final customer. *See id.* 188–89 (testimony of Matthew B. Burris), 274, 340 (testimony of Peter C. Fuller); *see also id.* at 274–75 (testimony of Peter C. Fuller that 90% of Fuller Box customers requested that their name be printed on the jewelry box itself and not on the outer cardboard container, because customers were more likely to retain the jewelry box than the outer container.)

17. Some of the subject jewelry boxes, such as the M100N, H1R, and G10N models, provided for repeated and easy removal and replacement of jewelry, such as rings and necklaces. This was accomplished by simply lifting the tab on the insert and placing the jewelry into the box and then pressing the tab back down. *Id.* at 251, 257 (testimony of Peter C. Fuller); *see also id.* at 251 (testimony of Peter C. Fuller that the tabs could be opened "thousands" of times.); *see* Plaintiff's Collective Exhibit 1–E, items M100N, G10N; Plaintiff's Collective Exhibit 1–A, item H1R.

18. The court finds highly probative and credible the expert testimony of John Kilmartin, President of International Packaging Corporation, which imports and manufactures covered metal and covered plastic boxes similar to the subject merchandise, *see Tr.* at 367–68, that Jewelpak could not have maintained market com-

petitiveness if its boxes could not withstand long term usage, *id.* 381–82.

19. The plastic boxes among the subject merchandise, Jewelpak's H series, are designed and constructed with a rigid plastic shell "that will not break easily," and a reinforced hinge that is designed "to stay assembled for a long period of time." *Id.* at 376 (testimony of John Kilmartin); *see* Plaintiff's Collective Exhibit 1–A, item H1R.

20. The court finds highly probative and credible the expert testimony of Donald Wolfe, President and Chief Executive Officer of Jewel Case Corporation, a company that produces and markets metal boxes comparable to Jewelpak's model M100N boxes, *see Tr.* at 443, that the trade expectations for the subject merchandise are "that [the subject merchandise] will get to the place of retail, that it will be used at the place of retail, and be usable later", *id.* at 456.

21. If any of these Findings of Fact shall more properly be Conclusions of Law, they shall be deemed to be so.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(a) (1994). Plaintiff timely commenced this action within 180 days of Customs' denial of its protest, and all liquidated duties and charges were timely paid.

2. The court has previously held in this case that as a matter of law if the boxes are suitable for long-term use that Defendant will prevail. *See Jewelpak Corp. v. United States*, No. 00–39, slip op. at 10–11 (CIT April 13, 2000), 97 F. Supp. 2d 1192, 1197 (CIT 2000).

3. Based on the foregoing Findings of Fact, the court finds the subject merchandise to be suitable for long term use. The physical construction of the merchandise, the ability of the merchandise to protect as well as store jewelry, the design and marketing of the merchandise, the expectation of both jewelry retailers and the ultimate purchaser that these boxes will survive repeated handling, in addition to other facts revealed at trial, support this conclusion. Accordingly, Plaintiff has failed to overcome the presumption of correctness (28 U.S.C. § 2639(a) (1994)) that attaches to Custom's classification.

4. Because the evidence shows that the subject merchandise is suitable for long term use, the court finds that the merchandise is properly classified as "jewelry boxes" under HTSUS heading 4202. By operation of this finding alone, the subject merchandise cannot be classified under HTSUS heading 3923, or HTSUS heading 7310.

5. If any of these Conclusions of Law shall more properly be Findings of Fact, they shall be deemed to be so.

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(Slip Op. 01–5)

## JUDGMENT

KAJARIA IRON CASTINGS PVT. LTD. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01240

(Dated January 24, 2001)

AQUILINO, *Judge*: The plaintiffs having interposed a motion pursuant to CIT Rule 56.2 for judgment upon the record compiled by the Interna-tional Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 44,843 (Aug. 29, 1995), *aff'd in part, remanded in part sub nom. Kajaria Iron Castings Pvt. Ltd. v. United States*, 21 CIT 99, 956 F.Supp. 1023, *remand results aff'd*, 21 CIT 700, 969 F.Supp. 90 (1997), *aff'd in part, rev'd in part and remanded*, 156 F.3d 1163 (Fed.Cir. 1998), *remanded*, 23 CIT , Slip Op. 99–6 (Jan. 14, 1999), *second remand results remanded*, 24 CIT , Slip Op. 00–20 (Feb. 18, 2000); and this court in slip opinion 00–147, 24 CIT (Nov. 9, 2000), having remanded to the ITA its remand results dated May 24, 2000, and stated to be pursuant to slip opinion 00–20 in order to eliminate the influence of rebates under India's International Price Reimbursement Scheme and Cash Compensatory Support program on the calculation of any subsidy under §80HHC of India's Income Tax Act; and the ITA having filed herein its *Final Results of Redetermination on Remand* dated December 11, 2000, and stated to be pursuant to slip opinion 00–147; and this court having reviewed those *Final Results* and not having received any comments thereon or opposition thereto from any party to this case; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the ITA's *Final Results of Redetermination on Remand* dated December 11, 2000, be, and they hereby are, affirmed.

(Slip Op. 01–6)

## JUDGMENT

CRESCENT FOUNDRY CO. PVT. LTD. ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 95–09–01239

(Dated January 24, 2001)

AQUILINO, *Judge*: The plaintiffs having interposed a motion pursuant to CIT Rule 56.2 for judgment upon the record compiled by the Interna-tional Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Iron-Metal Castings From India: Final Results of Countervailing Duty Administrative Review*, 60 Fed.Reg. 44,849 (Aug. 29, 1995), *aff'd in part, remanded in part sub nom. Crescent Foundry Co. Pvt. Ltd. v. United States*, 20 CIT 1469, 951 F.Supp. 252 (1996), *remand results aff'd*, 21 CIT 696, 969 F.Supp. 1341 (1997), *aff'd in part, rev'd in part*, 168 F.3d 1322 (Fed.Cir. 1998), *remanded*, 23 CIT, Slip Op. 99–5 (Jan. 8, 1999), *second remand results remanded*, 24 CIT, Slip Op. 00–21 (Feb. 18, 2000); and this court in slip opinion 00–148, 24 CIT (Nov. 9, 2000), having remanded to the ITA its remand results dated May 24, 2000 and stated to be pursuant to slip opinion 00–21 in order to eliminate the influence of rebates under India's International
Price Reimbursement Scheme and Cash Compensatory Support program on the calculation of any subsidy under §80HHC of India's Income Tax Act; and the ITA having filed herein its *Final Results of Redetermination on Remand* dated December 11, 2000 and stated to be pursuant to slip opinion 00–148; and this court having reviewed those *Final Results* and not having received any comments thereon or opposition thereto from any party to this case; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the ITA's *Final Results of Redetermination on Remand* dated December 11, 2000 be, and they hereby are, affirmed.

(Slip Op. 01–7)

THE UNITED STATES, PLAINTIFF *v.* GOLDEN SHIP TRADING COMPANY, JOANNE WU AND AMERICAN MOTORISTS INSURANCE COMPANY, DEFENDANTS

Court No. 97–09–01581

[Plaintiff's Motion for Summary Judgment granted in part and denied in part and Defendants' Cross-Motion for Summary Judgment granted in part and denied in part. Defendants are liable for negligent violations of 19 U.S.C. § 1592 and are assessed penalties but not marking duties.]

(Decided January 24, 2001)

*Stuart E. Schiffer*, Acting Assistant Attorney General, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division (*Erin E. Powell*), *Jeanmarie Reiner*, U.S. Customs Service, Office of Associate Chief Counsel, Of counsel, for Plaintiff.

*Levine & Mass* (*Thomas J. Kovarcik*), for Defendants.

## OPINION AND ORDER

### INTRODUCTION

BARZILAY, *Judge*: This case is before the court on cross-motions for summary judgment. Plaintiff ("Customs") commenced this action to recover civil penalties from the defendants Golden Ship Trading Company, Incorporated ("Golden Ship") and Joanne Wu ("Ms. Wu") for violation of 19 U.S.C. § 1592(a) (1992) and to recover marking duties for violations of 19 U.S.C. § 1592(d) (1992). The plaintiff alleges that Ms. Wu negligently presented material false statements both on the entry documents and the product that misrepresented the country of origin of the merchandise ("tee-shirts") as the Dominican Republic when the actual country of origin was the People's Republic of China. Plaintiff further alleges because of Ms. Wu's violative conduct the United States was deprived of lawful marking duties. Ms. Wu claims that she exercised reasonable care and did not negligently introduce merchandise into the commerce of the United States. Ms. Wu further claims the plaintiff was never owed marking duties because it cannot prove the marking duties were lost as a result of the allegedly improper country of origin marking.

### JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1582 (1992) which provides for the judicial review of civil penalties assessed under 19 U.S.C. § 1592 (1992).

### BACKGROUND

At issue before this court are three entries of imported tee-shirts. The tee-shirts were imported by Ms. Wu from Pedro C. x A.("exporter"). *Examination Before Trial of Joanne Wu*, pp.10–11, 14. ("Wu Dep.") Ms. Wu and the exporter began their business relationship after Wu and

Hui Tse Nu ("Hui"), the principal of the exporter, met and discussed the possibility of cooperating to import the tee-shirts into the United States. *Wu Dep.*, pp. 14, 24. Wu claims Hui explained that he operated a factory in the Dominican Republic and wanted to import the tee-shirts through Wu into the United States. *Id.* Wu decided she would form the Golden Ship Trading Company and import the tee-shirts from Hui's factory in the Dominican Republic.[1] To facilitate the importation process, Wu hired a licensed customhouse broker. *Wu Dep.*, pp. 19, 21–22, 25–27, 38. Hui furnished all the relevant information necessary for the broker to prepare the import documents including securing the appropriate visa for entry of wearing apparel into the United States. *Wu Dep.*, pp. 24–25.[2] Even though Wu did not attempt to verify the accuracy of the information Hui provided, she signed the entry papers and the declaration stating that the country of origin of the tee-shirts was the Dominican Republic. *Wu Dep.*, p. 24. After an investigation by Customs it was determined that the actual country of origin of the tee-shirts was the People's Republic of China. *Pl.'s Statement*, at ¶¶ 14–15. Customs discovered that the exporter would produce the body of the tee-shirts in China and then export them to the Dominican Republic. *Id.* In the Dominican Republic sleeves were attached to the body of the shirt. *Id.* After the sleeves were attached the shirts were exported to the United States and marked to show the Dominican Republic as the country of origin. *Pl.'s Statement*, at ¶ 14. The process performed in the Dominican Republic did not constitute a substantial transformation to confer origin according to the Customs regulations then in effect. *See* 19 C.F.R. § 12.130(e)(2); *See infra* p. 8. Having uncovered the scheme, Customs determined the true country of origin of the tee-shirts was the People's Republic of China. Therefore, the government alleges, Wu signed the country of origin declaration falsely stating that the country of origin was the Dominican Republic and that these materially false statements, acts and/or omissions were performed without due care and constitute violations of 19 U.S.C. § 1592. *Pl.'s Statement*, at ¶ 9. The government now seeks penalties in the amount of $44,656.00. Additionally, the government alleges the false statements caused it to lose marking duties in the amount of $14,568.

Ms. Wu does not dispute that the country of origin is the People's Republic of China, but she denies any negligence on her part. *See Defs.' Memo. in Supp of Cross. Mot. for Summ. J. and Opp'n to Pl.'s Mot. for Summ. J.*, at 11–12 ("Defs' Br."). She claims that she was

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[1] Defendant Wu had incorporated Defendant Golden Ship for the purpose of importing and was the sole officer and owner. *Pl.'s Statement of Uncontested Facts*, at ¶¶ 2,3,4 ("*Pl.'s Statement*"). American Motorists Insurance Company separately resolved the government's claims against it. *See Order of Dismissal*, July 21, 2000.

[2] The importation into the United States of certain textile products and wearing apparel is subject to quantitative restrictions depending on the country of origin and the tariff provisions of the product. In order to control the exportation of textile products into the United States to prohibit unauthorized entry and to combat illegal transhipment and quota fraud, Customs has established a visa system for the importation of certain commercial shipments of textiles and wearing apparel. Visas are issued by the foreign government involved and products which do not have the proper visa are denied entry into the commerce territory of the United States. *See* http://www.customs.treas.gov/impoexpo/impoexpo.htm.

defrauded by the exporter because he concealed the fact that the tee-shirts were manufactured in China. *See Id.* at 10. Furthermore, Ms. Wu denies that she owes marking duties because the government cannot prove marking duties were lost as a result of the improper country of origin markings.

## STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(d). Moreover, summary judgment is a favored procedural device "'to secure the just, speedy and inexpensive determination of an action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987). Whether a disputed fact is material is identified by the substantive law and whether the finding of that fact might affect the outcome of the suit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In actions brought by the United States to recover monetary penalties "all issues, including the amount of the penalty, shall be tried *de novo*." 19 U.S.C. § 1592(e)(1).

## DISCUSSION

### A. *Plaintiff may not recover marking duties under 19 U.S.C. § 1592(a).*

Plaintiff claims that it is entitled to marking duties under 19 U.S.C. § 1592(d), in the amount of $14,568.00, as a consequence of Ms. Wu's material and false statements made to Customs regarding the merchandise at issue. The statute provides that "if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." 19 U.S.C. § 1592(d). The marking statute provides for a ten percent *ad valorem* duty to be paid on a mismarked article. *See* 19 U.S.C. § 1304 (h).[3]

The case of *Pentax Corp. v. Robison*, 125 F. 3d 1457, 1462–3 (Fed. Cir. 1997) *reh'g granted*, 135 F. 3d. 760 (Fed. Cir. 1998) illustrates when such *ad valorem* duties must be tendered. *Pentax* involved the importation of photographic and optical equipment and accessories marked as originating in Hong Kong, when the products were in fact produced in the People's Republic of China. *See Pentax*, 125 F. 3d at

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[3] 19 U.S.C. §1304 provides in relevant part:

(h) Additional duties for failure to mark

If at the time of importation any article . . . is not marked in accordance with the requirements of this section, . . . there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation. . . . At the time of importation of the entries at issue, this section was designated as 19 U.S.C. § 1304(f).

1460. Seeking to mitigate any penalties for violating § 1592(a), Pentax made a "prior disclosure" to Customs pursuant to 19 U.S.C. § 1592(c)(4), admitting that it had imported falsely marked camera equipment. *See Pentax v. Robinson*, 20 CIT 486,487; 924 F. Supp. 193, 194 (1996). This court determined that as a consequence of Pentax's failure to correctly mark the correct country of origin on the merchandise, additional duties of ten percent of the merchandise's value were owed under 19 U.S.C. § 1304(f). *See Id.* at 492. The Court of Appeals reversed holding that "the act of culpably mismarking goods cannot be said to have deprived government of the [marking duties]. *Pentax*, 125 F. 3d at 1463. In so holding the court articulated its but-for test:

> We interpret the section 1592(d) causation requirement as requiring nothing less than but-for causation. . . . Section 1592(a) prohibits misrepresentations resulting from misconduct–fraud, gross negligence, or negligence. Thus, the actions that violate § 1592(a) are the acts of fraudulently or negligently mismarking imported goods. If the act of culpably mismarking the goods deprived the government of duties. . . then those duties are of the type whose tender is required. . . .

*Id.*

Thus, the mismarking must be the but-for cause of the loss of marking duties in order for Customs to recover the 10 percent value of the merchandise.

In its moving brief, the plaintiff states that "as a consequence of their violative conduct, Ms. Wu is liable for unpaid marking duties under 19 U.S.C. § 1592(d)." *Pl.'s Mot. for Summ. J.*, at 11 ("*Pl.'s Br.*"). This assertion by itself does nothing to explain how the mismarking was a but-for cause of the loss of marking duties; it merely states a legal conclusion. Ms. Wu argues that Customs has not proved that it would have collected the marking duties but for the country of origin information contained in the entry documents, because Customs has not shown that: (1) it would have reviewed the country of origin information before entry; (2) the country of origin information caused it to forego inspection of the marking; and (3) it would have discovered a country of origin marking error prior to entry. *See Defs.' Br.*, at 7. Hence, according to Ms. Wu, Customs' claim for marking duties under §1592(d) must fail.

Plaintiff responds that Golden Ship's assertion is a distortion of the law regarding collection of marking duties. *See Pl.'s Opp'n and Reply to Def.'s Cross Mot. for Summ. J. and Opp'n to Defs.' Mot. for Summ. J.*, at 6 ("*Pl.'s Opp'n*"). According to Customs, under the *Pentax* test, the plaintiff must prove that (1) the entry documents contained material false statements or omissions, (2) lawful duties were not paid, and (3) the government would have collected the duties but for these false statements or omissions. *Id.* at 3.

The court agrees with Ms. Wu that Customs cannot prove but-for

causation. Plaintiff correctly notes that 19 U.S.C. § 1304 requires that marking duties accrue if merchandise has been mismarked and has entered into the commerce of the United States. However, *Pentax* stands for the proposition that if the duty could not have arisen but for the mismarking, then the act of mismarking cannot be the but-for cause of the failure to collect the duty. *Pentax*, 125 F.3d at 1463. Here, Ms. Wu is correct that the mismarkings on the entry documents and tee shirts did not deprive Customs of the marking duties under the statute. Because of the specific requirements on importation of wearing apparel marked as originating in the People's Republic of China, importation would have been denied for lack of the proper visa and no marking duties would have been required.[4] Therefore,following the Federal Circuit's reasoning in *Pentax*, the court holds that the mismarkings did not deprive Customs of marking duties and the plaintiff cannot recover such duties under § 1592(d).

B. *Ms. Wu negligently submitted material false statements to Customs in violation of 19 U.S.C. § 1592(a).*

The statute allowing Customs to recover penalties, 19 U.S.C. § 1592, provides in relevant part:

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of

(i) any document written or oral statement, or act which is material and false, or

(ii) any omission which is material, . . . .

Section 1592(e) describes the burden of proof that each side bears in a penalty action based on negligence. The United States bears the burden of establishing that the material false act or omission occurred; the burden then shifts to the defendant to demonstrate that the act did not occur as a result of negligence. *See* 19 U.S.C. § 1592(e)(4). In this action, Customs has adequately demonstrated that the material false act occurred. However, Ms. Wu has not shown the court that these acts were not a result of negligence. Therefore, the court holds in favor of Customs on the penalty claim.

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[4] *See supra*, n. 2.

(1) *Plaintiff has met its burden of showing that the material false act of mismarking the entry papers occurred.*

(a) *The country of origin designation was false.*

The country of origin rules in effect when the entries were filed are contained in 19 C.F.R. § 12.130 *et seq.* (1992). The pertinent sections of sections of 12.130 are as follows:

> Country of origin. For the purposes of this section and except as provided in paragraph (c), a textile or textile product,. . . imported into the customs territory of the United States, shall be a product of a particular foreign territory or country, or insular possession of the U.S., if it is wholly the growth, product, or manufacture of that foreign territory or country, or insular possession. However, except as provided in paragraph (c), a textile or textile product. . . which consists of materials produced or derived from, or processed in, more than one foreign territory or country, or insular possession of the U.S., shall be a product of that foreign territory or country, or insular possession where it underwent a substantial transformation. A textile product will be considered to have undergone a substantial transformation if it has been transformed by means of a substantial manufacturing or processing operations into a new and different article of commerce.

19 C.F.R § 12.130(b).

> An article or material usually will not be considered to be a product of a particular foreign territory or country or insular possession of the U.S. by virtue of merely having undergone one of the following :
>
> (i) Simple combining operations, labeling, pressing, cleaning, or packaging operations, or any combining thereof;
>
> (ii) Cutting to length or width and hemming or overlocking fabrics which are readily identifiable as being intended for a particular commercial use;
>
> (iii) Trimming and/or joining together by sewing, looping, linking, or other means of attaching otherwise completed knit-to-shape component parts produced in a single country, even when accompanied by other processes (*e.g.* washing, drying, mending, etc.) normally incident to the assembly process. . . .

19 C.F.R. § 12.130(e)(2).

The government argues Ms. Wu falsely indicated the country of origin of the imported tee-shirts as the Dominican Republic when the real country of origin was the People's Republic of China. Customs

contends that the tee-shirts were only assembled in the Dominican Republic and that the assembly did not qualify the tee-shirts as a product of the Dominican Republic. *See* 19 C.F.R. § 12.130(e)(2). Therefore, Customs claims Ms. Wu falsely filed three separate sets of entry documents in 1992 and 1993 that listed the Dominican Republic as the country of origin and that the tee-shirts contained labels stating "Made in the Dominican Republic." *Pl.'s Br.*, at 7–8. Ms. Wu admits that under the country of origin rules the tee-shirts' proper country of origin is the People's Republic of China. *Defs.' Br.*, at 11–12. Although Ms. Wu concedes that the true country of origin of the tee-shirts is the People's Republic of China, they deny liability for the mismarkings because they claim they were defrauded by the exporter.

The government has proved that under the country of origin rules the tee-shirts are not a product of the Dominican Republic. The mere sewing of the sleeves onto the tee-shirts in the Dominican Republic would not qualify the entries as being a product of the Dominican Republic. *See* 19 C.F.R. § 12.130(e)(2)(iii). Ms. Wu's claims of exporter fraud do not impact the fact that the entry papers and merchandise were mismarked with the improper country of origin. Ms. Wu has only given reasons why the country of origin was mismarked rather than refute Customs' evidence that the actual country of origin was the People's Republic of China. Therefore, the court finds the entry papers falsely stated the country of origin as the Dominican Republic when the true county of origin was the People's Republic of China.

(b) *The country of origin designations were material.*

Plaintiff next cites several tests for determining when a false statement is material. In essence, a statement is material "if it has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty. . . ." 19 C.F.R Part 171 App. B(A) (1992). In the case before the court, Ms. Wu entered merchandise that was manufactured in the People's Republic of China, but merely assembled in the Dominican Republic, as tee-shirts manufactured in the Dominican Republic. The country of origin label on the tee- shirts read, "Made in the Dominican Republic."

Plaintiff asserts that the false statements made as to the proper country of origin for the entries at issue are material "because the false statements directly impacted Customs' assessment and collection of duties and affected the admissibility of the merchandise." *Pl.'s Br.* at 10. Ms. Wu responds that the plaintiff's claim is insufficient because had the tee shirts been properly marked as originating in the People's Republic of China, they would not have been allowed entry into the United States, and therefore no duties would have been collected. However, this argument is unavailing for Ms. Wu as it demonstrates that the false statements directly impact upon the admissibility of the tee-shirts. Because Ms. Wu's false entry documents impact admissibility, they are material.

(2) *Ms. Wu has not shown that her mismarking of the entry papers was not negligent.*

Since the court holds that the statements on the entry papers were both material and false the only remaining issue is whether Ms. Wu has carried her burden that "the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4). Customs regulation 19 C.F.R. Pt. 171 App. B (1992) defines negligence as:

> A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise reasonable care and competence expected from the person in the same circumstances in ascertaining the facts or drawing inferences therefrom, in ascertaining the offenders's obligation under the statute, or in communicating information so that it may be understood by the recipient. As a general rule, a violation may be determined to be negligent if it results from the offender's failure to exercise reasonable care and competence to ensure that a statement made is correct.

19 C.F.R. Pt. 171 App. B(B)1.
To decide if the mismarking was the result of Ms. Wu's negligence the court must examine the facts and circumstances to determine if Ms. Wu exercised reasonable care under the circumstances.

Customs alleges that Ms. Wu negligently introduced merchandise into the commerce of the United States when Ms. Wu "took no action to ensure the accuracy of the entry documentation presented to Customs." *Pl.'s Opp'n*, at 9. Customs contends that Ms. Wu's negligence is illustrated by her failure to ascertain (1) where the fabric for the tee-shirts was made or (2) where the tee-shirts were manufactured prior to signing the country of origin declaration or the quota declaration. *Id.*

Ms. Wu admits she relied on the information provided by the exporter and accepted his representations that the Dominican Republic was the country of origin of the tee-shirts because "all the documents that the exporter provided *prior* to entry stated the country of origin was the Dominican Republic." *Mem. of Def. in Supp. of Cross Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J.* at 11 ("*Defs.' Opp'n*"). Further, she claims that she was the victim of the exporter's fraudulent scheme which was so elaborate that even Customs had difficulty discovering. *Id.* at 14. Ms. Wu points out that the exporter did have a tee-shirt factory in the Dominican Republic and that the factory did perform some manufacturing operations on the imported tee-shirts. Ms. Wu also claims "figuring out which (tee-shirts) qualified as country of origin Dominican Republic and which did not required an entire team of Customs investigators, special agents and import specialists. Obviously, the exporter's fraud in this case was well-concealed." *Id.* at 12. Furthermore, she contends, if Customs had difficulty investigating and uncovering the exporter's falsifications, how could Ms.

Wu, with far fewer resources and less expertise, be expected to know that the entry papers falsely reflected the country of origin of the imported tee-shirts. Therefore, Ms. Wu claims, she was justified in relying on the exporter's entry information.

The court finds that Ms. Wu failed to exercise reasonable care because she failed to verify the information contained in the entry documents. Under the regulation's definition of reasonable care, Ms. Wu had the responsibility to at least undertake an effort to verify the information on the entry documents. There is a distinct difference between legitimately attempting to verify the entry information and blindly relying on the exporter's assertions. Had Ms. Wu inquired as to the origin of the imported tee-shirts or, at minimum, attempted to check the credentials and business operations of the exporter, she could make an argument that she attempted to exercise reasonable care and competence to ensure that the statements on the entry documents were accurate. Instead Ms. Wu applies circular reasoning to prove she was not negligent. She assumes she would not have been able to discover that the exporter was misrepresenting the county of origin and therefore was not negligent even though she made no attempt to verify. The critical defect with Ms. Wu's argument is that it removes the reasonable care element from the negligence standard. The exercise of reasonable care may not have guaranteed success, but the failure to attempt any verification undercuts the argument that she would have been unable to determine the truth.

Ms. Wu failed to "exercise" reasonable care because she utterly failed to attempt to verify the exporter's information. Indeed, Ms. Wu admits, and the evidence is uncontraverted, that she relied solely on the word of the exporter.

> Q. What information did you rely on when you signed this document that indicates that the single country of origin of the imported items was the Dominican Republic?
> A. I believe [sic] Pedro. He said he sent me all the documents and the documents said it's made in the Dominican Republic so I just signed them.

*Wu. Dep.*, p. 24, lines 9–15.

Furthermore, Ms. Wu openly admits she did not inquire at all about the origin of the imported merchandise.

> Q. Did you discuss with Mr. Hui (the exporter) where the fabric from the tee-shirts where made?
> A. I never asked. I don't [sic] know how to ask. I never asked it.

*Wu. Dep.*, p. 17, lines 3–6.

Although it is apparent Ms. Wu did not directly research the authenticity of the exporter's claims, she argues that she employed the services of a licensed customhouse broker and relied on the broker's

expertise to properly prepare the import documents. *Defs.' Opp'n*, at 13. However, Ms. Wu did not attempt verify or ascertain the correctness of the information prepared by the broker.

Q. Did you discuss with the broker where he got the information from?
A. I did not discuss it with him.

*Wu. Dep.*, p. 26, lines 13–15.

Even though Ms. Wu did not attempt to verify the country of origin, she still signed and certified the accuracy of the information contained in the entry documents. *Wu Dep., p. 24; Pl.'s App.* 2–5. Ms. Wu's reliance on the exporter and the broker does not remove the obligation to exercise reasonable care and competence to ensure that the statements made on the entry documents were correct.

The court finds that Ms. Wu's failure to attempt to verify the entry document information shows she did not act with reasonable care and did, therefore, attempt to negligently introduce merchandise into the commerce of the United States in violation of 19 U.S.C.§ 1592 (a)(1)(A) and, therefore, must pay a civil penalty for her negligence pursuant to 19 U.S.C. § 1592(c)(3)(B).

With regard to the amount of the penalty, the court directs the parties to attempt to settle the matter by consultation guided by the court's opinions in *United States v. Complex Machines Works Co.*, __ CIT__,83 F. Supp. 2d 1307, (1999) and *United States v. Modes, Inc.*, 17 CIT 627, 826 F. Supp. 504, (1990) regarding mitigation.

Therefore, it is ORDERED that Plaintiff's Motion for Summary Judgment is granted in part and denied in part; and it is further

ORDERED that Defendants' Cross-Motion for Summary Judgment is granted in part and denied in part; and it is further

ORDERED that the parties consult in good faith regarding the appropriate penalty amount; and it is further

ORDERED that a telephone conference be held on February 21 at 10 a.m. to allow the parties to report on their consultations and to decide whether further proceedings in this matter are necessary.

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